IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

WILLIAM MOORE and J. S. McFERREN, Partners, doing business under the firm name of MOORE & McFERREN.....*Appellants*

v. No. 222.

R. J. McGUIRE, E. H. WOODS, E. S. WOODS, M. Y. SCOTT, M. M. SCOTT, E. M. SCOTT, W. A. YERGER, W. H. FITZGERALD, HUBERT WILSON and C. L. JONES .....*Appellees*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLANTS

I.

The following synopsis may assist the court in the hearing of this cause:

II.

THE PLEADINGS.

This is a suit involving the title to the lands comprising Island 76, formerly called Chapeau and Corn

Island, lying in the Mississippi river, about ten or fifteen miles below the mouth of the Arkansas river.

The Bill

Was filed in the court below on the 2d day of November, 1899, and contains substantially the following allegations: The island in controversy is a part of the territory of the State of Arkansas. The lands having been duly surveyed by the United States, were entered by various persons in the federal land office at Helena in that State in the year 1847, except a small tract known as the S. W. Fl. qr. Sec. 2 S., R. 12 W., which passed to the State of Arkansas under the Swamp Land Grant made by Congress by the act of September 28, 1850. The lands thus entered at Helena were all patented by the United States soon after the entries to the persons making the entries in the land office or to their assignees. Copies of the patents are made exhibits to the bill. (Tr. pp. 13-25.) The small tract of swamp land above mentioned was also patented to the person entering the same by the State of Arkansas in 1890. (Tr., p. 26.) The title to these lands passed to the plaintiffs by mesne conveyances; all of which documents are set out with great particularity in the bill, and were produced at the hearing of the cause.

By various mesne conveyances the title to all the lands became vested in Mrs. Sallie H. Murphy, who by her deed conveyed them to the plaintiffs on the 22d day of August, 1898.

The bill farther charges that defendants claim title under the State of Mississippi, as having passed to that State from the United States by reason of the Swamp Land Grant of 1850. Plaintiffs have been in possession ever since the execution of the deed to them. The lands lie in Desha County, Arkansas, and taxes have been regularly paid on them in that State ever since they were entered. They are of the value of more than two thousand dollars, exclusive of interest and costs. They were surveyed and platted by the United States as a part of the State of Arkansas, and the survey, known as "Pelham's U. S. Survey," was approved December 23, 1846. (P. 7.) The Mississippi river is the line between the two States.

It is claimed by the defendants that the lands are a part of Bolivar county, Mississippi, lying as they do opposite Desha county, Arkansas. Bolivar county was organized by an act of the legislature of Mississippi of February 9, 1836, which does not purport to include the island, but meanders with the east shore of the Mississippi river.

Revised Code Mississippi, 1857, Sec. 15, Art. 80, p. 63.

For the first time, about August 20, 1899, plaintiffs learned that the defendants were claiming the lands under some kind of a tax deed purporting to have been executed under the laws of Mississippi. Prior to 1882 neither that State nor Bolivar county had ever claimed

the lands; but in 1881 or 1882, changes having occurred in the channel of the river, the collector of Bolivar county, under an assessment to unknown owners made in Bolivar county, pretended to forfeit the lands for taxes to the State of Mississippi, which sold them to J. T. Currie and M. A. Hull; but in 1893, on application of the purchasers, this claim was abandoned, and the money paid by them was refunded to them by the State. (P. 9.)

In the summer and fall of 1898 plaintiffs established a camp, laid foundation for houses and tents on the lands, and cut a considerable amount of timber, making also a raft of timber which was anchored to the island.

About August 12, 1899, defendants attempted to take possession of the island by the intrusion of their agent, the defendant Jones, who seized on the raft of logs, claiming it and other timber, of the value of $2,075, for the cutting of which the plaintiffs had paid.

This illegal possession was however only maintained for a short time, after which the defendants then brought an action of replevin against plaintiffs in the circuit court of Bolivar county, Mississippi, for the timber that the plaintiffs had cut, and sent a sheriff of that county with a writ, under pretence of which the officer seized the property therein named, and placed it in the custody of one D. W. Wilson.

Defendants also brought an action of forcible entry

and detainer in Bolivar county against the plaintiffs to recover possession of the lands above described, and another suit in the same county to recover both the land and the timber.

Defendants make their claim under the Swamp Land Grant to the State of Mississippi of September 28, 1850; but long before that date the title to the lands had been divested from the United States by the entries made in the Helena land office in 1847, and by said patents from the State of Arkansas and the United States.

As the said pretended claim of title made by the defendants makes a cloud on the title of them, they say that their pretended claim is void, and they pray for an injunction to prevent farther trespasses, and for a receiver to take charge of the personal property and to sell it; that the pretended title of the defendants be declareed void; that the title of the plaintiffs be quieted; and for all other proper relief.

The receiver was appointed, injunction was issued as prayed. (P. 34.) The receivership having been completely wound up, and the receiver discharged, by agreement of counsel matters relating to the receivership are omitted from the printed transcript. (P. 303.)

Answer of the Defendants. (P. 40.)

The lands lie in Mississippi, and hence the court has no jurisdiction; and defendants are neither citizens or residents of Arkansas, or found in the district. Require proof of the title papers of the plaintiffs. Admit

the United States survey made by Pelham; but deny that it shows that the lands lie in Arkansas; on the contrary it shows that the main channel of the river was west of the island. By an act of the legislature of Mississippi, passed February 24, 1836, and by various similar acts, it has been declared that the middle of the river is the boundary between the two States. Denies that the State of Mississippi ever abandoned her claim to the island, or repaid any purchase money for the lands on the island sold at a tax sale. Denies that either party claims under the Swamp Land Grant. The lands were assessed for taxes in Bolivar county for 1881, and were forfeited to the State, and were sold and conveyed by the State to the defendants, who, having merged their several claims, now hold them in common. Exhibited with the answer is the tax deed to Currie and Hull above mentioned in the bill; also the tax deeds under which the defendants severally claim; also the deed by which their several titles were pooled. Also a copy of a deed from Currie and Hull to the defendants.

Replication to the answer was filed, and the cause was set down for hearing. (P. 50.)

III.

THE EVIDENCE.

By a written stipulation it was agreed by counsel that abstracts of title might be introduced, unless a

party should object to a particular conveyance twenty days before the hearing. Abstracts were accordingly filed, and the original conveyances constituting the title of the plaintiffs were produced without objection. By the same stipulation it was farther agreed that copies of letters passing between the United States, the commissioners of the General Land Office and the Attorney General of Mississippi, might be read, subject to objections for incompetency. (P. 60.) For abstract of the title of plaintiffs see pages 62, 65.

As to Possession.

C. W. ORTON for Plaintiffs (P. 145):

For a time I resided on Island 76. I was studying forestry. From the last of May to about the first of September, 1899, I was employed by the plaintiffs to look after the timber on the island. O. L. Sanders was there from the fall of 1898 cutting, hauling and shipping logs for them. He was gone when I got there, but a cook, a man named Perry, was there with a part of their plunder. The plaintiffs paid me for my services. [The witness produces letters and other papers confirming his statements.]

CLAUDE H. MOORE for Plaintiffs (P. 192):

I was general manager for the plaintiffs. Soon after the plaintiffs bought the island we placed O. L. Sanders in charge of it, and he cut, hauled and delivered several hundred thousand feet of logs during that year,

1898. He went back on the Arkansas river about the first of January, because the island was wet and muddy, returning in August, 1899, in order to get out the rest of the logs. During his absence I put C. W. Orton in charge to keep any one from molesting the property, and he remained until the receiver was appointed. Plaintiffs took possession about September 1, 1898. When Sanders left they had on the island a skiff and 500 or 600 logs ready to haul, and the frame work for barns and tents. He left Palmer Wilson in charge for the plaintiffs. [The witness produced papers showing his occupancy.]

O. L. SANDERS for Plaintiffs (P. 196):

Plaintiffs sent me to the island in September or October, 1898, to cut and deliver logs. We left in January or February, 1899, because the island was muddy, and we wanted to get some logs on the Arkansas river. We returned as soon as we got out the logs there. I left Wilson in charge during my absence, and he stayed until I got back in July or August, 1899. When we went away we left several hundred logs on the island, a skiff, the foundation of our tents and corral house with the barn for the stock. The framework of the barn was made of posts set down, with poles and rafters put in to hold up the fly to cover the stock. The tents were walled up with plank, three or four feet high. The poles were set in the ground with planks nailed around

them; and on these the tents were set. Returning we found these all there. We remained in possession until the receiver took charge.

HUBERT WILSON for the Defendants (P. 199):

I went to the island about September 22, 1899, as deputy sheriff, and levied a writ of replevin on some timber and a raft; that is, Mr. Edwards did, leaving me in charge. The writ was at the instance of Mr. McGuire, and against the plaintiffs. I stayed there until about the last of November with Charley Jones. Palmer Wilson, his father, and Orton were there. After four or five days Orton went down to the camp of Sanders, about 200 yards below us. Possibly two weeks later he said that he had been in possession of the place for several months for the plaintiffs at ten dollars a month. Plaintiffs gave bond for the raft and sold it. I saw the tents. None of them were floored. I levied on 1,210 logs. altogether. The logs were newly cut. They were valued in the writ at $1,415. When I went on the island there was a force there cutting timber.

ANDERSON HENCE, colored, for Defendants (P. 204):

I was on the island most of the summer and fall of 1899. Orton was not in charge. Palmer Wilson had the government lights in charge. Orton told me that Sanders would not pay him because he would not say that he was in charge of the island, or something of the kind. Orton never held possession of the land.

C. L. JONES for Defendants (P. 240):

Deputy assessor of Bolivar county. Was on the island in August, September and part of November, 1899. Went there to take possession for defendants, and found there Palmer Wilson, his father, and Orton. I posted up my notices, and no one objected to my taking possession until Sanders came. They all agreed to leave if I said so. One night a steamer landed with a logging outfit and some men. Orton, the two Wilsons and a little negro I had with me went down to the boat armed, and kept them from unloading their plunder and wagons. Orton assisted me in putting up notices against trespassers. One day Sanders with ten or twelve men and a logging outfit came on the island. Being instructed to use no violence I let them come on, though I objected. There was no property on the island except about 100 or 150 old logs; no framework of any tents, and no sign of any camp, and no skiff. I knew that some one had been cutting timber there, but I did not know who; and I never asked.

Evidence as to the Channel of the River.

Letter of Frank Johnston, attorney general of Mississippi, to William H. Sims, first assistant secretary of the Interior Department, dated Washington, D. C., March 22, 1904. (P. 66.)

This letter states that the lands had been entered at Little Rock, adding:

"From the information given me—but which is not conclusive—this island was originally on the western side of the stream, though it is now east of the channel."

Letter of Edward A. Bowers, assistant commissioner of the General Land Office, Washington, D. C., April 6, 1894, to Frank Johnston, attorney general of Mississippi. (P. 66.)

"I have to state that, as shown by the records, the greater part of said island was disposed of in 1847 at Helena, Arkansas, by cash purchase, and the remainder was approved to the State under the Swamp Land Grant on May 7, 1858. It was also approved to the State of Mississippi, September 24, 1852, under said grant."

R. J. MATTHEWS for Plaintiffs (P. 143):

In 1890 or 1891 Judge Murphy, husband of Mrs. Sallie Murphy, asked me to go to the island and see about some parties that were cutting posts there. I went there twice to see about it. The first time I knew about the channel there was in 1857, when I went down on a produce boat we were coasting down the river. The channel was on the Mississippi side; and we went down on the left. I was running a small packet from Memphis to Vicksburg in 1860 and 1861. We almost always went on the Mississippi side, and when the water was low we always went that way. When on through boat we went to the right of the island.

GEORGE MALONE for Plaintiffs (P. 153):

Have been captain and pilot on the Mississippi since about 1852. I remember the island since I was a boy about 1842. I was pilot of a flat boat about 1848 or 1850. The main channel was then on the left in going down. I was engaged in flatboating about two years. The channel changed, I think, about 1882. In high water we could go down on the west side; but in low water we had to go down the east side of the island.

MRS. L. M. BURRUS, for Plaintiffs (P. 188):

Will soon be 79 years old. Live at Neblett's Landing, just opposite Island 76. Except for two years I have always lived within a few miles of the same place. I went to Neblett's Landing in 1839, with my husband and lived on his plantation at Neblett's Landing. The main channel was east of the island. The boats passed directly in front of our house. I do not think that they could pass up the chute on the other side except in very high water. The channel on the Arkansas side was generally called the chute. I was 18 years old in 1839. From 1841 to 1849 the boats passed our door every day.

JOHN C. BURRUS for Plaintiffs (P. 190):

Fifty-three years old. Have known the island ever since I was a boy. In the fall of 1866 my brother was merchandizing on the river just opposite the island, and I attended the landing there for several months. The main channel was on the east side. Light draft

boats sometimes passed up the chute, but no heavy draft boats ever passed up the chute. I do not know when the channel changed. The change was rapid. In 1866 or 1867 a man named Sterling lived on the island. In 1866-7 the chute was a very narrow, shallow stream. My earliest recollection of the river was in 1857. In 1863 or 1864 I was placed on duty as picket at Bolivar at the lower end of the island for several weeks for the purpose of ascertaining the number of troops that went down the river; and the boats passed east of the island. The water was low at the time.

BEN G. WEEKS for Plaintiffs (P. 123):

I am clerk of Desha county, Arkansas, and as such I have the custody of the assessment and tax books of that county, which show that the lands in controversy were regularly listed and taxed since the year 1865. Some of the records have been lost or destroyed. I do not find any assessments or tax records in my office prior to 1865. Mrs. Sallie Murphy paid the taxes from 1884 to 1887, since which time the taxes have been paid by the plaintiffs.

E. H. NALL for Plaintiffs (P. 124):

I am State Land Commissioner for the State of Mississippi. The records in my office show that the lands in suit were *first* assessed in 1881 to unknown parties, and that they were sold for the taxes of that year, and were not redeemed, and were purchased from

the State September, 1891, by Currie and Hull, after having been sold to the State. [Witness copies the records in his deposition.] Under the entries on the record occurs the following *in red ink:* "Cancelled November 23, 1892, and State tax and int. refunded."

CROSS-EXAMINED.

The note *in red ink* resembles the handwriting of W. D. Holder, then deputy auditor of public accounts under W. W. Stone, auditor, in whose custody the books then were. Have examined the books, and find nothing relating to these lands prior to 1881. There are plats and field notes showing that the lands belong to the State of Mississippi. When lands are erroneously returned delinquent, they are sometimes stricken from the record.

MARSHALL J. MILLER for Plaintiffs (P. 111):

I will be 78 years old next month. I live in Memphis. Have been a pilot and steamboat captain on the Mississippi river for many years. I began as a pilot September 9, 1839. I have been acquainted with the channels of the river at Island 76 ever since that time. It was then on the Mississippi side, crossing from Cork's point to Wehawk plantation, which was then a wood-yard. This map (referring to map facing p. 176) shows the situation very well. Witness gives the names of various vessels on which he ran as master and pilot. I think the channel changed in the latter part of 1860.

It took several years to complete the change. We would run through the Arkansas channel for a short cut; but there was no business down there; but we went that way in high water. But the main channel was on the Mississippi side until about 1880.

CROSS-EXAMINED.

I was 17 years old in 1839. That was the year of the lowest water ever known. I started out as a pilot under my father and brother. My father was an old bargeman. For about three years I have been in poor health, and have not been on the river. In low water there was water on the west side of the island, and light craft could get up in low water. The channel on the western side was the widest, but that on the eastern side was the deepest. There was a change when the cut-off was made at Napoleon. Such changes are generally made gradually. My father began barging in 1802-3, and was barging on the Mississippi in 1812 during the war with England. My oldest brother was with him, and they told me that during the war the channel was on the east side. One of the first wood-yards established on the river was just above the island on the Mississippi side. My father and brother told me that there had never been any change in the channel at that point within their memory.

THOMAS A. WILCOX for Plaintiffs (P. 116):

Age 72; master and pilot of steamboats on the Mississippi river since 1847. I have been going up and

down the river ever since. When I first passed Island 76 the channel was on the east side. It was several years in making the change. We quit running the old channel about 1882 or 1884. We never had much business on the Mississippi side after that. After 1884 we had to go on the Arkansas side.

CROSS-EXAMINED.

When I first saw the island the channel on the Arkansas side was much wider. The banks have caved in since that time; and now the channel on the west side is much wider still; twice or three times as wide. When I first saw the place eight or nine-tenths of the water went down the east side; and it was much deeper than on the west side; a sort of funnel shape to receive the water. It took several years to make the change. I think this map (facing p. 172) is a good representation of when I first saw it.

RE-EXAMINED.

At that time a man named Rouse lived there on the Arkansas side. At one time there was a small horse gin there, several negro cabins and an overseer's place; all near the head of the island; but they are all caved in and gone. The channel runs in to the right of that now. The width of the channel did not matter; it was the depth. I often saw stock of various kinds fording the channel from the Arkansas side to the island.

In a second deposition the same witness says (p. 121):

I went to Napoleon, Arkansas, to reside in 1855, and stayed there until 1862; within 12 or 14 miles of Island 76. I bought property at Napoleon, and piloted boats on the river, which has been changed since then. It is now about one and a half or two miles farther west. A big sandbar there makes the river wider; and it would measure about that distance across it to the east side of the island; the main channel being now on the west side. The main channel was on the east side. I know it from my own knowledge, for I piloted there. I handled several hundred barges of coal annually while I lived there; and on one occasion I had what we term a fuel flat. I had several hundred tons of cheap nut coal, and one of my barges got loose, and drifted down to the head of the island, and lodged there. The channel was then on the east side of the island; and the barge lodged there because there was not water enough on the Arkansas side for it to go through; but there was enough on the Mississippi side if it had drifted that way, and it would have gone on down. While I lived at Napoleon the channel was always on the Mississippi side, east of the island.

A. E. DRINKWATER, for Plaintiffs(P. 119) :

Aged 62. Live at Memphis. Master and pilot of steam vessels since 1855. The channel was then on the Mississippi side. For the last few years, there has been water on both sides of the island. The change was

gradual. There has been water on both sides in the past few years, and I think that it was about 1882 that the western channel was usually navigated for heavy boats. Before that time in high water boats could run on the Arkansas side, but in low water they could run only on the Mississippi side. The channel is now on the west side. I suppose the change was going on for 10 or 15 years. I was thoroughly acquainted with the river in 1855. I think that the change was completed about two years ago.

CROSS-EXAMINED.

Referring to the "Choctaw" map, facing p. 176, says that it is similar; but there have been little excavations and cuttings, and the bank has changed appearance gradually, but the general outline has the same appearance.

X. J. PINDALL for Plaintiffs (P. 151):

Am a lawyer by profession. From 1862 until 1875 the main channel of the river was on the east side of the island. In 1862 Gen. Parsons crossed his command over the river at a point just below the island. I was on his staff. We camped about the mouth of Cypress creek, and in getting ready to cross the river it was a part of my duty to ascertain where the channel was so that we might watch the approach of the boats, and note the direction and distance from us. I found that the channel was east of the island. I lived at Napoleon

from January, 1866 to 1875. During that time I had interests on the island as attorney for others and for myself. As a matter of common history the channel changed during the early eighties.

W. Q. COLE for Plaintiffs (129):

Auditor of public accounts of the State of Mississippi, and as such I have the custody of the books relating to the assessment, collection and redemption of land of the State, among which are the assessment rolls from 1883 till to 1900. I can find but few back of that date. The assessment roll of Bolivar county for 1876 shows no assessment of the lands in suit; but they were assessed for 1883. The next assessment is for the year 1887, and the next is for the year 1892, when they are assessed in the names of Currie & Hull. They were also assessed for the year 1896. Disbursement register for 1892 shows warrant No. 4476, drawn in favor of Currie & Hull for $58.20, and the voucher shows that it was the State's proportion of the purchase money refunded. [Witness copies the records showing these facts, and exhibits a copy of the deed from the State to Currie & Hull, conveying the lands, dated September 28, 1891. (P. 134.) At the end of this deed appears the following memorandum, *in red ink:* "Land lies in Arkansas. Cancelled November 23, 1892, & State tax & int. refunded. W. W. Stone, auditor."] I have in my office the following letter by Hon. Frank Johnston,

attorney general of the State, which is as follows (P. 139):

"Office of Attorney General, Jackson, Miss.,
April 20, 1894.

Hon. W. W. Stone, Auditor of Public Accounts:

"Dear Sir: At your request I have examined the question whether Island No. 76 in the Mississippi river, opposite Bolivar county, belongs to the State of Mississippi, or the State of Arkansas.

"The exact point on which the inquiry turns is upon the fact as to whether the middle of the main channel was west of the island in 1817, the date of the admission of Mississippi into the Union. If the island lay on the east of that channel in 1817 then it belongs to Mississippi.

"After examining all sources of information open to me in the Department of the Interior at Washington, I am unable to get the exact data necessary to a definite decision of the question. There are no maps or surveys of the river made at or since that time showing the location of the island in 1817.

"I enclose a copy of a letter written by Hon. John Wilson, Commissioner of the General Land Office, to Hon. Jacob Thompson, of date February 28, 1855, showing that the ownership of the island has been claimed by each State. It was included in the general surveys from each State approved by the Department at Washington.

"It appears, however, that the entire island (except about 51 acres) was sold and patented to individuals in 1847 by the United States government through the United States Land Office at Little Rock, Arkansas.

"I am farther informed that the lands embraced in this island are not upon the books of the United States Land Office at Jackson, and have never been sold or dealt with at this latter office.

"Mr. Wilson expressed the opinion in his letter to Mr. Thompson that the island belongs rightfully to Mississippi; but qualifies this expression by saying that if the thread of the main channel could be shown to have been to the west of the island in 1817 then the ownership would be in Mississipi.

"He does not allude to the fact that the lands had been sold by the United States Government in 1847 through the United States Land Office at Little Rock.

"This fact is not conclusive; but it's the only evidence that I can gather which tends to solve the doubt. It tends strongly to show that the United States Government regarded the island at that time in the State of Arkansas.

"Again the owners of these lands have been for many years paying taxes to the State of Arkansas, and refusing to pay to the State of Mississippi.

"In 1882 these lands were sold at tax sale to the State of Mississippi, and in 1891 the State sold the same to Currie and Hull.

"In 1892 the conveyance to Currie & Hull was cancelled and money refunded to them by the auditor on the advice of Hon. T. M. Miller, then attorney general of the State, and on the approval of the governor, upon the ground of an erroneous assessment, the island *'being within the limits and the property of the State of Arkansas.'*

"I perceive no reason for disturbing this ruling and decision of your office.

"And so as it has been sold to the State again for taxes, and is now on the list in your office, I think it proper for you to adhere to your former ruling, and strike it from the list of lands in your office.

"I enclose the following documents to be filed with this communication, viz.: (1) Letter of Hon. John Wilson, Land Commissioner, February 28, 1855. (2) Letter of Edward A. Bowers, Assistant Land Commissioner, April 6, 1894. (3) Certificate showing entries of land at the United States Land Office at Little Rock.

"Very truly your ob't sev't,

"FRANK JOHNSTON, Attorney General." (P. 130.)

The witness continued as follows:

This letter is in the handwriting of Mr. Johnston, and is, I think, a part of the records of my office.

T. M. HENRY for Plaintiffs (P. 142):

This witness proves that the memoranda above referred to as being made on the records *in red ink* is in the handwriting of W. D. Holder, who was deputy auditor under W. W. Stone, who held office from 1886 to 1896. Holder died in 1900.

W. J. SHACKLEFORD for Defendants (P. 251):

Age 32; civil engineer. Refers to map attached to Nall's deposition, facing p. 234. The narrowest point on the channel east of the island is about 528 feet. Generally on the Mississippi river the land is higher at the bank than anywhere else and on the channel side, and clearings would generally be made on that side on account of that fact and of convenience of landings. I made an independent plat from the field notes referred to in Mr. Nall's testimony (Pp. 213 *et seq.*); and it tallied with the map above mentioned.

Cross-examined (P. 255):

The bank lines would not correspond on the Mississippi side with those on the map because the banks have caved 500 or 600 feet since the map was made. I never did any surveying on the island. When I first saw the island in 1892 there was an old house on the upper end of it; but I think that it is no longer occupied. I have not been on the island for about five years. There has been no caving on the island or on the adjacent banks since I have known the place.

Defendants read the following documents:

Letter from Governor McWillie of Mississippi, May 3, 1859, to Hon. Jacob Thompson, Secretary of the Interior, enclosing letters from Major Downing and William G. Ford, with the certificate of the Secretary of State, containing, as he says, all the information that he has about the island. (P. 68.)

This is indorsed:

"Interior Department. Received July 23, 1859. Referred to Commissioner of the General Land Office. W. W. Lester, Acting Chief Clerk."

Letter from W. G. Ford, Memphis, Tenn., April 29, 1859, to Governor McWillie, stating that he had purchased the lands in controversy from the State of Mississippi; that they had been disposed of as Arkansas lands; that Arkansas had not the shadow of a title to them; that they have been confirmed to the State of Mississippi seven or eight years previously. The writer urged the governor to get a patent to the lands from the United States. (P. 68.)

Letter of A. Downing to William G. Ford, dated Jackson, January 18, 1859.

The writer says that he had been traveling up and down the Mississippi river for more than 30 years. The channel on the Mississippi side was quite narrow, in the middle of it not over 100 yards wide. Had never heard of a steamboat going up or down it. Had heard

that a hunter standing on the mainland could shoot a deer on the island; and from his own observation, believed that this could be done. He examined the banks in 1835. The east bank of the river had not fallen in much.

Letter from John Wilson, Commissioner of the General Land Office, to Hon. Jacob Thompson, dated Washington, February 28, 1855. (P. 69.)

Believes from an inspection of the plats that the lands belong to Mississippi, and should not have been surveyed as lying in Arkansas. "Still I must qualify this opinion by stating that if it should be found by measurements and evidence taken on the spot that the middle of the main channel of the river as it existed in the year 1817, the date of the act of admission of the State of Mississippi prescribed her bounderies was situated east of the island, and remaind unchanged until the year 1836, the date of the act of admission of Arkansas as a State, then the island undoubtedly belongs to the latter. But if in 1817 the middle of the main channel was east of the island, and in 1836 was west of the island, then it will occupy the peculiar position of not being within the limits of either State according to the boundaries prescribed by the acts of admission."

Defendants read a letter from Thomas A. Hendricks, Commissioner of the General Land Office, Wash-

ington, D. C., July 23, 1859, in which he quotes the letter of Jacob Thompson above referred to, and continues as follows (P. 70):

"Under this view of the case if satisfactory proof shall be presented to this office that the middle of the main channel of the river in 1817 was on the west of said island, the jurisdiction thereof properly belongs to Mississippi; and in that event the title of the lands from the Government of the United States having vested in the purchasers as within the State of Arkansas, I am of the opinion that the State of Mississippi in virtue of her right under the Swamp Grant of 1850, should receive from the General Government an indemnity in kind equivalent to that received from the purchasers.

"With your letter I find the statement of A. Downing, dated 18 January, 1859, going to show that Island 76 belongs to the *Mississippi* side, and falls within our limits as defined by the treaty of 1783. Mr. Downing was formerly surveyor general of Mississippi, and great reliance is to be placed on his statement. If, therefore, you will add to it his affidavit with the testimony of any other distinterested witness, so as to bring the matter within the qualifications of my predecessor's opinion, and stating that the island is of a swampy character. Such is the additional testimony contemplated by Secretary McClellan's decision as required by the second section of the Act of 2nd March, 1855,

notwithstanding the island has been reported as swamp; the testimony will then be fully of equal grade to that required in analogous cases, and thereupon an account will be opened between the State and the United States with a view to her reimbursement by Treasury Warrant to the amount of cash which the United States by sale have received therefrom, and, in case of the location of any part of the island by warrants, or scrip, a certificate to that amount, authorizing the selection of other lands subject to entry at $1.25 per acre will be issued; such being the mode of indemnity prescribed by the second section of the Act of 2nd March, 1855, in cases where the lands taken by the Swamp Grant have been disposed of by the United States."

Defendants read letter from E. F. Best, Acting Commissioner of the General Land Office, dated "Department of the Interior, General Land Office, Washington, D. C., June 27, 1896," addressed to the Register and Receiver, U. S. Land Office, Jackson, Miss., as follows (P. 71):

"Sir:

"The plat of survey of T. 21 N., R. 8 W., Choctaw Meridian, approved in 1836, shows Island 76 in the Mississippi river to be designated as sections 36 and 37, containing 674.20 and 234.38 acres respectively; but such sections or lots are not subdivided into smaller tracts.

"Island No. 76 was also surveyed under the direction of the United States Surveyor General for the District of Arkansas, *and the* plat of *such survey was approved October* 23, 1846. The plat of each survey shows the main channel of the river to be west of the island, and consequently the island is in Mississippi. The plat approved October 23, 1846, shows Island 76 to be in Secs. 35 and 36, T. 11 S., R. 1 E., and in sections 1 and 2, T. 12 S., R. 1 E., 5th Principal Meridian. The lands on said island disclosed by the Arkansas survey were all disposed of in 1847, with the exception of the N. E. fractional quarter of Sec. 35, T. 11 S., R. 1 E., containing 35.92 acres; which tracts were approved to the State of Arkansas as Swamp Land, January 7, 1858.

"The lands on said island as shown by the survey of 1836 in T. 21 N., R. 8 W., were selected by the State of Mississippi as Swamp Land, June 12, 1852, List No. 1, and approved as such September 24, 1852, List No. 1, Grenada series. No part of the island has been patented to either State as Swamp Land.

"It is not necessary to consider the question of the irregularity of either survey. It is sufficient to state that the United States disposed of all the land except 51 acres prior to September 28, 1850, and consequently the tracts so disposed of were not granted by the Swamp Land Grant of that date.

"It is the intention of this office to submit the matter to the Secretary of the Interior, *with the recom-*

mendation that approval of so much of said approved Swamp Land, List No. 1, Grenada Series, as related to the island in question be revoked. At the same time a new list, containing 51 acres referred to (N. E. frl. quarter section 35, T. 11 S., R. 1 E., and S. W. fractional quarter section 2, T. 12 S., R. 1 E., 5th P. M.) will be submitted for approval to the State of Mississippi.

"You will advise the governor of the condition of the case, and of the proposed action, and allow him sixty days in which to object thereto, if he desires to do so; and in due time you will make full report in the premises to this office."

Endorsed: "Filed December 20, 1905."

WILLIAM McANDREWS, for Defendants, (P. 257):

It would be quite impossible to give a summary of this deposition, which is that of an expert, and is very voluminous. The witness says that he is a civil engineer; and if he is a competent expert concerning the speculative visions of the past history of the Mississippi river in which he indulges, he does not seem to be duly appreciated by an undiscriminating world, as shown by his own testimony. (P. 226.) He was first interviewed on the subject by Mr. McGuire, one of the defendants about a year before he was examined as a witness. (P. 282.) He knows nothing of the facts of the case from his personal knowledge, but traces the life history of the Mississippi river by a system of introspection and

a transcendental and *a priori* examination of various maps. Like most teleological discoursers he indulges in assumptions that make but small appeal to human credulity. Thus he says that the land contiguous to the bed of the river is generally higher than the land farther back, and that this is "particularly so as to islands" (P. 258); thus ascribing self- consciousness on the part of the Father of Waters; a view not yet wholly accepted by hydrographers.

In another instance the witness, referring to the map facing p. 234, which shows that the upper end of the eastern channel is wider than the central portion, he says that a channel of that sort would soon choke up, as the water could not get through (P. 261), though he admits that at the narrow part of the river it would scour the channel, and would make it deeper. (P. 270.) Looking at the U. S. survey (facing p. 172), made in 1846, we perceive that the west channel was considerably wider than the east channel, and that on the larger space on the map the surveyor wrote the words, "Mississippi River," with an arrow showing the direction of the current. From these indications the witness infers conclusively that the surveyor meant to show that the main commercial channel was west of the island, (p. 262, 268), though the map shows that the survey of the island is an extension of the survey on the adjacent mainland in Arkansas, and though the field notes made February 7, 1846, state expressly that the channel is on

the east side, "the main channel being on the left or Mississippi side of said island, and the inhabitants of said island vote and pay taxes in the State of Arkansas." (P. 173.)

The witness expressly states that he had never verified any of the surveys, and that he spoke only from the maps. (Pp. 267, 271.)

Because a surveyor crossed to the island from Mississippi in 1830, the witness infers that at that time he, the Surveyor General, crossed dry shod! He says, sagaciously: "When he made the survey in the fall of October, 1830, it was our customary dry season, and he had no trouble in crossing what I hold *must have been the bar* across the chute at the head of the island." (P. 275.) His conclusions as to the channel are based on inferences from the shape of the island and that of the shores of the mainland, and also on the supposed effect of natural laws always in conflict. These specutions are ostensibly based exclusively on the map.

C. H. WEST for Defendants (P. 284):

Civil engineer. The average width of the river from the Arkansas side to Vicksburg is full stage 5,200 feet, low water 2,260 feet. Where there is an island the channel side of the river is usually about the same as the width of the channel at other places along the river. I do not speak from actual measurements. The Mississippi is an eccentric stream, and often changes its channel from one side of an island to another; it occasion-

ally makes cut-offs, and does widen its channel at one point, and on one side of an island. It does widen the channel at one point, and at another deepens the channel; but seldom, if ever, does it return to the old river beds. Frequently deep and heavy deposits are made on an island in a single year.

CHARLES LE VASSEUER, for Plaintiffs (P. 155):

Civil engineer; graduated from Ecole Polytechnique School of France in 1878. Was in the army as field engineer and from 1883 to 1889 was chief engineer of the Panama canal. From 1890 to present time United States Assistant Engineer, Mississippi River Commission. Am acquainted with the Mississippi river, having surveyed in the 1st, 2d, 3d and 4th districts. I am familiar with the locality at Island 76.

The map made by McRee, surveyor of public lands, dated January 22, 1829 (facing p. 170), shows that a certain portion of it is sectionized, and that it is in Arkansas. There is nothing in the map to show which side of the island the channel was running. The width of a channel orbed of a river does not indicate the depth of the water. From the map I cannot tell the distance to the Mississippi shore. There is nothing to indicate the distance; there are only triangulations from the Arkansas shore toward several points on the Mississippi shore. It is only intended for a land map. The Pelham

map (facing p. 172) shows that the island was surveyed and sectionized as being in the State of Arkansas, There is nothing in the map to indicate a caving bank. The map seems to show a sand bar west of the island, and that the river flowed east of the island. The channel west of the island must have been dry at the time the sketch was made. The distance between the island and the Mississippi side cannot be taken as accurate, as no measure on the field notes is shown by triangulation or otherwise. The only distance shown accurately on this sketch and notes is the channel of the island west of Island 76 and the Arkansas shore. Referring to the map of May 31, 1830, (facing p. 176) the witness says that that map does not show the exact width of either channel. I suppose from the map and the statement on its face that the surveyor sectionized the whole of township 21 that it was not in his mind that the island belonged to township 21, R. 8 W. of the State of Mississippi, or else he would have also sectionized the island. The arrow on the maps only indicates the direction of the current. The old maps do not pretend to show where the channel of the river has been or is. The surveyor of public lands has nothing whatever to do with the river proper, its channel or its depth; but he only had to survey and sectionize the territory for the State in which he has been appointed. There is nothing on the map to compute the actual distance from the island

to the main bank of the State of Mississippi. The width of a chute is not in direct ratio with the channel of a stream. If the river is very wide, the bed is generally flat, and the channel is at its least depth; but where the river is confined between banks a short distance apart, it is generally where the deepest channel is found.

Referring to map facing p. 170, dated January 22, 1829, witness says that wherever triangulations were made, if they were correct, the distance from the Arkansas to the Mississippi shore can be obtained; but only at the points were they were made. You can get the distance from point marked A at the head of the island to point D on the Mississippi shore by scaling. The apex of the triangulations is very small, and the base is so small that that by skipping 300 or 400 feet would be detected. It is reasonable to suppose that the shore line is approximately correct as far as the sketch goes; but it is not sufficiently accurate to make any determination.

Map of 1830 (facing p. 176) would indicate that the engineer did not consider the island as within the State of Mississippi as he did not sectionize it.

Referring to map of 1830 (facing p. 176), the witness says that it does not show any traverse, though a note dated 1832 mentions a traverse. The map only contains 35 sections.

Cross-examined, p. 169:

I had no knowledge of these matters until 1892 except from the records in our office, which go back to 1874.

When Napoleon, Ark., was washed away old Island 76 was washed away, and a new island was formed east of the first island, now also known as Island 76. [On reading over the deposition the witness corrects this statement. He was at the time thinking of another island, called Dean's Island.] (Pp. 170, 183.)

This momentary failure of memory by the witness may open the way for criticism; but considering the great number of islands in the Mississippi, it is not surprising. On the other hand it demonstrates that the witness was testifying conscentiously, and not as a mere hireling expert, resolved to sustain the position of the plaintiffs at all hazards.

A question addressed to this witness by the plaintiffs having remained unanswered by inadvertence, an order for re-examination was granted by the court. (P. 76).

The witness exhibits a map, (facing p. 187,) made by the Mississippi River Commission of the United States in 1881, and says that it is correct. The witness explains this map in detail. He points out a sandbar at the head of the island. From this to the Mississippi shore the distance is 1850 feet. The witness gives the depths of the water in the eastern channel at different

points ranging from 12 to 77 feet. (P. 180). The lowest depth is next the island. The red line on the map represents the curving of the bank between 1881 and 1889 on the east side of the island. Witness gives the width of the eastern channel at different points as shown on the map; at one point 700 feet, at another about 2000 feet. In November, 1899, there was a sand formation and the chute was dry. At that time the river was very low. A gauge of 15 feet at Memphis would have thrown the water over the sandbar, and would, I suppose, have enabled steamers to run over it. At the head of the chute in 1881 the depth of the water was from 22 to 24 feet. Just below that on the Mississippi side it was 38 to 44 feet, and below on the same side it was 62, 44, 18 and 19 feet, graduating back to the island. The red and black lines show a width of 700, 1000, 950 and 700 feet going down the east channel, and that the eastern boundary of the island has been increased by sand formation between December, 1881 and November, 1899. In the latter year the island was attached to Mississippi by a sandbar when the river was extremely low, the gauge at Memphis being then 1-05. The maximum at Memphis is 39 feet. Island 76 is not an accretion to the State of Mississippi.

CROSS-EXAMINED.

In 1899 the channel for boats was west of the island. In 1881, as the map shows, the greater part of the water flowed west of the island. The island is

moving east. The "Choctaw map," (facing p. 176) made in 1830, shows by scaling that the shortest distance between the island and the Mississippi shore was about 530 feet. The map does not show any triangulations; but it is supposed to be a correct representation of the field notes. In 1889 the distance was 950 feet and in 1881 about 1000 or 1200 feet.

The "Choctaw" map does not show the depth of the water, and from it the volume of water cannot be computed. The witness explains the difference between a surveyor and an engineer. Knows the witness, McAndrews. He made application to enter the federal service as a civil engineer; and his application was rejected.

IV.

SPECIFICATION OF ERRORS.

1. The court erred in the admission in evidence of the letter of A. Downing.

2. The court erred in holding that the lands were in the State of Mississippi, and that they did not form any part of the territory of Arkansas.

3. The court erred in refusing to render a decree as prayed in the bill.

4. The court erred in dismissing the cause for want of jurisdiction.

NOTES ON THE EVIDENCE.

Arkansas was admitted into the Union by act of Congress of June 16, 1836.

5 Stats. at large, 50.

Mississippi was admitted by act of March 1, 1817.

3 id. 348.

The land on island 76 was surveyed as consisting of fractional section of townships 11 and 12, S. R. 1 E. of the 5th. Principal Meridian.

In the Mississippi Survey it is described as being in T. 21., R. 8 W., Choctaw District. (See map facing p. 176.)

The first map in point of date is that of McRee, Surveyor of Public Lands for Arkansas, facing p. 176, certified January 22, 1829. In this map the island is not sectionized; but the platting and triangulations show it to be in the State of Arkansas.

The next survey was made by William Pelham, Surveyor of Public Lands for Arkansas, facing p. 172, dated Little Rock, Dec. 23, 1846. In this map the island is sectionized as a part of Arkansas.

All of the lands were entered in the Helena land office in 1846, except about 51 acres passing to the State of Arkansas under the Swamp Land Grant of September 28, 1850, which, having been patented, was purchased by Mrs. Sallie H. Murphy, to whom State patents were issued in 1898. (P. 28.)

It was by a mere oversight that the Land Officers at Washington classified the lands on the island as Swamp Lands in Mississippi long after they had been entered and patented to private persons, and had been forever severed from the public domain. As to the 51 acres of Swamp Land, as the land had always had a status as Arkansas land, the certification that it formed a part of the State of Mississippi was a palpable error.

The island in question was never considered as forming any portion of the State of Mississippi. On the 24th February, 1836, the legislature of that State passed an act creating the county of Bolivar, describing the western boundary as proceeding from a point on the river, and continuing *"Thence up the Mississippi river"* to a certain other point; thus defining the western line of the county.

Rev. Code Mississippi 1857, Sec. 15, Art. 80, p. 63.

The map known as the "Choctaw" map, facing p. 176, dated 1830, showing the Mississippi survey, has the words "Mississippi River" and the emblematical arrow on the east side of the island, and represents that channel as being funnel shaped, as testified by the witnesses. The land on the Mississippi side is sectionized, but the island is not; showing that at that period the island was not supposed to be in Mississippi. It appears that after the survey was made a small piece of paper was attached to the field notes containing these words:

"Island 76 is in T. 21, R 8 W., and not in T. 22, R. 8 W., and that instead sections 6 and 7 should be sections 3, 6 and 37, T. 21. This island is properly within Township No. 21, in Range 8 West Distance X the chute of island 76 from the beginning of the east St. N. 40 E. 2920, intersecting the opposite traverse 20 ch. on the 1st. St." (P. 213.)

Though the field notes speak of a traverse, none is shown on the map.

Although the map purports to be a complete map of T. 21, R. 8 W., and most elaborate surveys were made on the Mississippi side, the map indicates no surveys of the island.

In the court below, as we understood counsel for defendants, it was argued that by the amended plat and by scaling at about the middle of the eastern channel it was shown that it was only about 528 feet wide. No actual measurement at this point by the surveyor appears to have been made; but it was claimed that this conclusion was correct because the shore survey of the island was made to correspond with the island survey and that calculations can be made from corresponding points on the island and on the mainland.

This contention is not correct because it is made clear that the island was surveyed—if surveyed at all—to fit on to another and a different township; and that, as it was discovered that it would not fit with township 22, it was transferred to the shore line of Township 21 without farther adjustment of the shore lines.

But if the different points on opposite shores did correspond, yet there is no way by which the width of the channel could be ascertained except by triangulations, unless the water was low enough to admit of the services of a chain bearer.

We submit that on the entire evidence in this cause it is impossible to deny that the main navigable channel of the river prior to 1881 or 1882 was east of the island, though boats could go down the west channel during high water. The witnesses for the plaintiffs testifying on this point had peculiar opportunities of knowing the facts of which they speak; and not a breath of suspicion attaches to any one of them. They corroborate each other, and they are not contradicted by any one. On the other hand they are corroborated by the verdict and solemn judgment of time.

If what we have said is a mere chimera, why was it that Mississippi never claimed the island? She was the first on the ground. That state was organized as such, nearly a decade of years before Arkansas was admitted into the Union. It may be argued that in those early years the island was of but little or no value. If so, it was not of much importance to either state; and such no doubt was the case. But it was worth as much to one state as to the other; and the fact of its small value shows that the surveyors and land offiers were not biased by any improper motives in forming their judgment that the island was a part

of Arkansas—a satellite so to speak—and was not a part of Mississippi. Fraud is never presumed; neither is mistake on the part of public officers acting in the sworn discharge of their duties; and certainly it requires very clear proof to raise even a shadow of suspicion when they are not here to speak for themselves, and have slept for many years the sleep of the just.

When the property was of such inconsiderable value there could be no inducement to fraud; and if fraud was extremely improbable mistake was impossible, because the question upon which this cause must turn was then easily determined simply by ocular inspection. No one, so far as shown, objected to the decision thus rendered; a decision that was known to all the world. Mississippi did not object; presumably because she had no reason to object; she never has objected during the sixty odd years that have passed since that decision was made. On the contrary she has repeatedly renounced any claim to the island. True, this has not been done by any legislative act. Acquiescence could hardly be expected to assume that form; but non-action by the legislature for so long a period is quite as significant as a legislative act would be.

There is one other matter that may be mentioned. We mean the measuring of the east channel by the scales of the different maps exhibited. We admit that this of itself would not be conclusive; yet it serves to support the other evidence in the record.

By the "Choctaw" map of 1830, facing p. 176, it is shown by scaling as follows:

1. That at the head of the east channel it was (as shown by field notes) 2920 feet. (p. 213.)

2. That at the narrowest point measured, it was 1320 feet.

3. That at the foot of the island it measured 1650 feet.

By McRee's map of 1829, facing p. 70:

1. At the head of the island 1320 feet.

2. In the middle of the island 1280 feet.

3. At the lower end, 1650 feet.

By map facing p. 234:

1. At the head of the island, 2900 feet.

2. At the narrowest point, 530 feet.

3. At the lower end, 990 feet.

With regard to the Pelham map it may be remarked that it not only shows that the island was a part of the State of Arkansas, but states that the inhabitants voted and paid taxes in Arkansas. There were, then, a few inhabitants there even at that early day; and his map shows four clearings on the eastern shore of the island.

The Government survey 1846, facing p. 172, shows the following:

1. At the head of the island, 2,960 feet.

2. At the middle of the island, 2,112 feet.

3. At the lower end of the island, 2,970 feet.

Great reliance is placed by the defendants on the sketch made by Capt. Young and Capt. Poussin of the Topographical Engineers in 1821, facing p. 288, purporting to be a "Reconnaisance of the Ohio River from Louisville to its mouth," and of the "Mississippi River from St. Louis to New Orleans" contained in 65 sheets. (P. 288.) We have here only an extract from this extensive map. The work, it is certified, was done during the months of October, November and December, 1821; but it is also stated that "the soundings on the bars were made during the months of October and November;" and as we cannot suppose that these officers made two journeys along these tremendous rivers, once to find depth currents and obstructions, and another to interview the countless sandbars never out of sight, it is certainly a fair conclusion that the month of December was occupied in comparing notes and constructing the map. Nor is there any statement as to the time actually employed in the whole work; only it is certified that it was done *within* three months.

When we look at a map of the United States the course of these two rivers have much the appearance of a corkscrew flattened by means of a heavy weight, showing continuous, incessant and most eccentric deviations from a straight line. The result of the convolutions of these giant and tortuous streams is that they are much longer than the expanses of country through which they run would indicate. As this ancient

map was not presented in court until the trial had proceeded for some time, (p. 84.) the plaintiffs had no opportunity to show the enormous difficulty of the work of making such a reconnaisance with any degree of accuracy, and the great length of time required for anything like an adequate result in the performance of such a stupendous undertaking.

But the judicial knowledge possessed by the court of the general physical conditions of the country, and of its leading landmarks renders the opportunity lost, a thing less to be regretted.

4 Wigmore Evidence, Secs. 2575, 2577, 2580.

Pennsylvania v. Wheeling Bridge, 13 How., 518, 561.

Cheeseman v. Two Ferry Boats, 5 Fed. Cas. p. 531.

The court takes judicial notice of geographical positions.

Peyroux v. Howard, 7 Pet. 342.

The fact that this case involves a dispute as to the boundary between two states "gives greater dignity and importance to such a controversy, and renders necessary a broader view than on a question as to the mere right of property."

Pennsylvania v. Wheeling Bridge Co. *supra.*

The court takes notice of the distances between well known points.

U. S. v. Thornton, 109 U. S., 659.

And of the navigabilty of rivers.

U. S. v. Rio Grande Irrigation Co., 174 id. 697.

"Indeed, it would seem absurd to require evidence as to that which every man of common information must know."

Id., 697.

And "the judges may refresh their memory and inform their consciences from such source as they may deem most trustworthy."

Jones v. United States, 137 U. S., 216.

Heath v. Wallace, 138 *id.*, 584.

But what is this paper? And for what purpose was it made?

Its title tells the whole story. It is a reconnaissance; merely tentative and experimental.

"*Reconnaissance.* * * * * (*Engin.*) An examination of a region as to its general natural features, preparatory to a more particular survey for the purposes of triangulation, or of determining the location of a public work."

Webster Dict.

It was not made for the purpose of settling any question involved in the present inquiry; and is entitled to no great consideration when we reflect on the extremely expeditious manner in which it was prepared. Emanating from the War Department, its pertinency to the business and exigencies of war is stamped on its face. Its relation is not to the demands or customs of peaceful commerce. Vessels of war have

undoubtedly ascended the Mississippi as far as St. Louis; but never except in high water; hence the map would necessarily indicate the preference for the wider channel at such a time; the only time eligible for them, that channel being in high water sufficiently deep, as well as shorter and more spacious.

Moreover, it was no part of the reconnaisance to ascertain the width of the river at different points; a task that would have required many thousands of triangulations; in short an accurate survey involving the labor of years. As to the width of the channels respectively that is the work of a draftsman; mere eye measure; and a mistake of half an inch under their scales would make a difference of 880 feet. To divest titles to land enjoyed without interruption for more than a half a century by treating such a screed as proof as strong as Holy Writ would be, we submit, hazardous and unjust in the last degree. If the War Department had made an accurate and a careful survey of the island and all of its surroundings, and had platted them in the most painstaking manner, the work would still be open to question; but when we have only a mere preparatory and preliminary sketch, made merely *ad informandum*, it would be alien to the intention of the War Department, and most unreasonable, to ascribe to it a position among the eternal verities. Even where the greatest skill is applied, errors in maps often baffle the labors of the historian and the geographer; and this is par-

ticularly true of maps like that in question, involving many elements of great complexity, and extending over vast regions of territory. The instructions do not accompany the map.

This case in this respect is like that of Missouri v. Kentucky, 11 Wallace, 395. The channel for navigation in that case, Wolf Island, originally lay east of the island, but a change in the channel had been effected by "gradual changes, caused in the basin of the Mississippi by the mighty rises to which the river is subject."

The report speaks of the witnesses for the defendant, Kentucky, "*many of them ancient,* including boatmen, navigators and several persons who had lived from childhood close by the island, *some opposite to it* (as Mrs. Burrus and her son in this case), and specially interested in their business to note on which side the vessels sailed, all testified that while now the main channel of the river was to be regarded on the east side of the island, it was undoubtedly, and, *within their memory and knowledge,* not so formerly, but was on the west side; many of these witnesses going into details, and *showing a positive and experimental knowledge on the subject upon which they spoke*; details *of that sort that could not easily be invented.*" (P. 398.)

It may be noted that in this case the testimony of living witnesses on the side of the plaintiff, Nestors of navigation, persons whose duty it was to take note

of the commerce of the channels, and an old lady living for a life time in sight of the eastern channel, and seeing boats passing before her door every day is not contradicted or impeached by a single witness.

Where is the force of the argument that the eastern channel could not be navigated when we have positive proof that it was constantly and habitually navigated down to 1882?

In the case of Missouri v. Kentucky, we learn that various old maps were relied on by Missouri. The court said:

"But it is said, the maps of the early explorers of the river, and the reports of travelers, prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses, based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle, to dispossess a party of property on the mere statements —not sworn to—of travelers and explorers, when living witnessses, testifying under oath, and subject to cross-examination, and the physical facts of the case, contradict them?"

"But, it is claimed the books and maps which antedate human testimony, establish the right of Missouri to this island. If this be so, there is recent authority for saying they are unreliable."

The court did, however, find one reliable map, "based on actual survey and investigations." But that map could not be more trustworthy than the original survey made by Pelham, United States Surveyor, in 1846, approved by the General Land Office, and never questioned seriously by any one, until the defendants obtained their tax titles. It is not worth while to expend much time on the speculations of Mr. McAndrews. He testifies concerning the McRee map, certified by Binger Herman, Commissioner of the General Land Office, dated January 22, 1829, facing p. 170. There is nothing on that map to show the depth of water in either channel; yet the witness does not hesitate to state under oath that the map shows that the channel was west of the island in 1829. (P. 258.) He sees various curving banks that are nowhere indicated on the map; and says that "the contour of the Arkansas bank shows that the current did not affect it!"

Referring to the Pelham map of 1846, facing p. 172, he asserts that the surveyor intended by it to assert that the island was then in the State of Mississippi, basing his conclusion on the fact that the words "Mississippi River" and the arrows placed in the wider space of the western channel, though the map itself shows that

it was included in the Arkansas Survey, the field notes expressly stating that fact also. (P. 173.). On the other hand it will be noticed that on the "Choctaw" or Mississippi survey of 1830, facing p. 176, relied on by defendants, the same words and the arrow are placed on the east side of the island. This witness, though he states the distances across the east channel positively from the map, says:

"The points at the foot of the island and at the head of the island, and corresponding points on the Mississippi shore, were carefully measured by triangulation, and the curve of Mississippi was then sketched in; then the surveyor *estimated* from the bank, so *fixed the width of the channel by eye measurement, and* sketched in the other *bank to correspond with that*— the bank already fixed." (Pp. 259, 278.)

Then the witness objects that the eastern channel is too wide at the upper end, contending that it would take in more water than could get through. (P. 262.) And as to the accuracy of his calculations note what he says on p. 268. He admits that where the channel is narrow the river scours and makes it deeper. (P. 270.) He admits that the "Choctaw" or Griffin map of 1830, facing p. 176, represents the river as being east of the island. (P. 271.) He also says that there is nothing on the "Choctaw" map, facing p. 176, to show the distance across the eastern channel. (P. 274). He explains why the whole of T. 21, R. 8 W., was not included in the Choctaw map, facing p. 176, by saying that the sur-

veyor forgot the island! (P. 276.) If the surveyor, he says, had made any measurements of the eastern channel, the map would have shown them. (P. 277.) The witness says that he knows nothing of these matters save from the maps presented. (Pp. 271, 279, 267.) The witness says that he was first "interviewed" concerning these matters by defendant, Q. J. McGuire about a year before his deposition was taken. (P. 282.) But he had made no study or investigation of this matter until the evening before and that morning. (P. 283.) And that he had given about an hour and a half to the subject, (P. 280.) For the rest and for many other changes and mistakes of this witness we must refer to the deposition of Mr. Le Vasseur, an engineer of the highest standing.

The lands in controversy were sold for taxes in Arkansas in October, 1883. (P. 30.) But it must not be inferred that taxes had not been for many years paid on them. Taxes in that State, as elsewhere, are assessed annually. Kirby's Dig. St., Sec. 7017. And if they are not paid at the proper time the lands are put up and sold. The amount of taxes for which these lands were sold to Mrs. Murphy in October, 1883, was only $88.54 (p. 30); thus showing that the delinquency could only have been for one or two years. Mrs. Murphy sold them to the plaintiffs in August, 1898, for $2,800. (P. 33.)

As to the letter of W. G. Ford and A. Downing (pp. 68, 70), they are not evidence of anything, being hearsay, pure and simple. The writers were merely private citizens; and it is not even proved that they ever wrote the letters.

John Wilson, Commissioner of the General Land Office, wrote Feb. 28, 1885, to Jacob Thompson, Secretary of the Interior: "I am of opinion *from the inspection of the plats* that the island in question belongs to the jurisdiction of Mississippi, and should not have been returned and surveyed as lying in the State of Arkansas;" but he qualifies this statement by saying that if it could be shown that the channel was east of the island when Mississippi was admitted into the Union *and so remained* until Arkansas was admitted in 1836, the island would belong to the latter. But if in 1817 the middle of the main channel was east of the island, and in 1836 it was west of the island, the lands would not belong to either State. (P. 69.)

As we perceive, the maps are purely land maps, and show nothing about the channel.

Yet Mr. Hendricks in his letter to Gov. McWillie of July 23, 1859, says: "I am of the opinion *from the inspection of the plats* that the island in question belongs to the jurisdiction of Mississippi, and should not have been surveyed and returned as lying in the State of Arkansas," copying this phrase from Wilson's letter. (P. 70.)

Neither of these officers imagined that they had any power to annul the patents previously issued; but Mr. Hendricks told his correspondent how indemnity could be obtained if the patents had wrongfully issued. (P. 71.)

On June 27, 1896, Mr. E. F. Best, Acting Commissioner of the General Land Office, writes to the Register and Receiver of the United States Land Office at Jackson, Miss., and follows suit, saying: *"The plat* of each survey shows the main channel of the river to be west of the island; and consequently the island is in Mississippi!" (P. 71.)

It is impossible not to see that these officials were under the impression that the State line followed the wider channel without regard to any other consideration. But whatever they thought or said is not of the slightest importance so far as this controversy is concerned, since they could not set aside patents previously issued.

At the close of his letter Mr. Best requests the Register and Receiver to advise the Governor of his views, and to allow him 60 days within which to object. (P. 72.)

And there the matter dropped; and has never been taken up again.

Objection was made to the introduction of these letters. (P. 83.) Though, of course, such objection was

not necessary. However, the court below based its judgment partly on this epistle of A. Downing. (P. 93.) If that letter of Downing—if it is his letter—is admissible in the courts, then all his letters must be equally so, having also the unusual quality of proving themselves. But the letter is mere waste paper, as the writer does not pretend to know anything about the facts, but had never heard of a steamboat going down the eastern channel. Then he says that he had "been told" so and so. The administration of justice is ticklish enough and hazardous enough without basing its judgments on such rubbish as this. The fact that Mr. Downing had never heard that a steamboat had gone down the eastern channel proves nothing. He had probably never heard of one going down the western channel.

McAndrews infers from the fact that the land on the bank of a river is usually higher than the land farther back indicates that the main current was on the west side of the island. (P. 258.)

It is a well known fact that the banks of rivers running through alluvial lands are usually higher than the lands lying farther from the stream; and the cause of this phenomenon is simple.

"If, however, rivers which are subject to high floods, such as the Nile, the Po and the Mississippi, are, during inundations, higher in level than the plains by the river side, this fact is owing to the lining of alluvion which

is gradually formed on the banks. During the period of flood the waters which pour over the banks are retarded by a thousand various obstacles—trunks of trees, bunches of plants, mounds, palisades, buildings—and consequently they deposit on the ground much of the sediment which they contain—before they leave the banks and flow far and wide into the plains they are comparatively purified."

Elisee Reclus, La Terre, ch. LIII.

According to the testimony of witness McAndrews no steamer—perhaps no watercraft—could ever have gone down the eastern channel; but the evidence of living witnesses wholly unnimpeached proves that they did habitually do so from times remote; and the court below so found. In order farther to prove this fact the witness relies solely on two maps made without any thought or reference to hydrography. By exercise of his obliterating faculties, by piling presumption on inference, by devious mental processes, and by intellectual triangulation, it might be proved by larger generalizations that the Mississippi river never had any real existence. It is manifest that he had received his cue from the Downing letter.

We need not be surprised to learn that the witness has gone to the Philippines, where he will find many islands and a larger sphere for his activities. (P. 187.)

The only criticism of the testimony introduced for

the plaintiffs has been that some of the most material of them were old when their depositions were taken; and that their memories had lost retentiveness.

In some cases this criticism would be eminently just; as for instance, in cases where aged witnesses testify as to casual matters that are easily forgotten. No doubt memory is one of the first faculties of the mind to decay. Nature does not care to replenish flames that must soon be extinguished. But old men usually remember events that occurred in childhood, youth, or early manhood better than those of later years, both because early impressions are usually the deepest, and because they are the most often recalled in later life. There are other continuous matters of routine running through a long series of years, concerning which the memory is constantly refreshed, which can never grow dim or be forgotten until the last semblance of mental activity has faded out. Even Falstaff, after a long life of dissipation, in dying "babbled of green fields," such as he had frequented in boyhood.

Of the witnesses for the plaintiffs, Marshall J. Miller, pilot and commander of vessels, was at the time of taking his testimony, nearly 78 years old. (P. 111.)

Thomas A. Wilcox, of the same calling, was 72 years old. (P. 116.)

A. E. Drinkwater, same profession, was 62 years old. (P. 119.)

Mrs. Burrus was 79 years old. (P. 188.)

To say that pilots who have passed their whole lives in running their vessels on the Mississippi river hundreds, if not thousands, of voyages, in all kinds of weather, and all seasons of the year, in the darkest nights, when the ordinary passenger could not see his hand before his face, and before searchlights were invented, threading the narrowest channels, avoiding every treacherous sandbar, every snag, with apparently the accuracy of instinct, could not remember on which side of a prominent island vessels usually passed is to express a paradox that transends the utmost bounds of human credulity.

To say that Mrs. Burrus living in sight of the eastern channel, and seeing boats passing and repassing during more than an average life time, continually hearing their bells and whistles, both in the day time and by night, could not remember these countless processions is equally incredible.

If any one of these witnesses had been in such a state of decrepitude as to render his or her testimony of little or no value, that fact could easily have been shown; but the courts cannot stigmatize a whole class of the wisest and best men and women in every community by announcing that they are untrustworthy, because of advancing age; and yet the court below refer to the deposition of Capt. Miller disparagingly, expressly because

he was seventy-nine years old, saying that "he might easily have been mistaken as to what his father told him." (P. 93.) This relates to what his father impressed on him in his youth when he was learning the business of running the mighty and dangerous river; the last thing perhaps that one would forget. And then the court added:

"It is *easily conceivable* that, his father having told him that this was the channel, and being aware of the fact that his father had navigated the river ever since 1812, he concluded that his father meant that the channel had been east of the island ever since he had navigated the river."

Yes; almost anything is *conceivable* to a person of vivid imagination. It is *conceivable* that Capt. Miller's father died before he was born; but the evidence is the other way; and we submit that where a witness is wholly unimpeached, and his testimony is clear and credible, the courts have no authority to disregard it, to put words in his mouth that he never uttered, and to base their judgments on mere travesties. Capt. Miller no doubt knew what he was talking about; his language is not in the slightest degree ambiguous; and perhaps nothing would naturally be more apt to be remembered.

Whatever the qualities of old age may seem to men of a younger generation, there appears to be no ground for saying or implying that old men and women are

less truthful than men of fewer years. The decay of the powers of fancy and imagination, the decline of the passions, the gradual detachment from material interests, and a solemn sense of impending dissolution, would seem to tend very forcibly in the other direction.

It is certainly not improbable that Capt. Miller's father told him what he is alleged to have told him, nor that it was true. What inducement to falsehood could there be? We have proof that cannot be questioned that as far back as 1838 and down to 1882 the eastern channel was the main channel for navigation; and it is not denied that the channel *changed* about the latter year as the result of a great cataclysm that wholly washed away the town of Napoleon at the mouth of the Arkansas river, and destroyed the plantation and houses on the Arkansas side of the river, throwing up a bar that choked the east channel. The evidence also undeniably shows that in making this change the river did not return to the old channel, but made a new one a mile or a mile and a half west of the former channel.

There is not a living witness for defendants that pretends to deny these facts, or to assert that the western channel was the main channel prior to 1882. It is not, then in the least degree surprising that the eastern channel should have been the main channel in 1812. The presumption would certainly be that way; and, as we shall show presently, the burden of proof on this

point is not on the plaintiffs, but on the defendants; a burden which they cannot evade, and which they have failed to lift. There is not a syllable of evidence to prove that the western channel was the main channel prior to 1882, only 17 years before the bringing of this suit, or that any boat ever tried to pass the eastern channel and failed, or was ever wrecked there. But then there is the Downing letter!

The court below in its opinion refer to the facts as stated in Missouri v. Kentucky, 11 Wall., 403, 404, adding: "This remark applies with great force to the testimony in this case."

We confess that we are not able to see the application. The extract from the opinion in the Missouri case demonstrates that the present case is materially unlike that. In that case none of the witnesses, as stated by the court, "ever made a personal examination of the channels and surrounding objects at this point," and that none of them except *may be* of one of them, ever lived in the vicinity of the island, or remained there any length of time, and that all the knowledge any of them acquired of the state of the river was obtained by passing up and down it at different times either on flat boats or steamboats.* * * And passing the river *only occasionally, and without any knowledge of where the volume of water flowed when the river was low,* they would naturally conclude it was the main channel."

This applies very well to Downing.

The evidence in that case was not only vague and insufficient; that of passengers on boats, not interested in matters of navigation, leaving such things to the commanders and pilots of the vessels to whose keeping, for the time being, they had entrusted themselves.

There is no "maybe" about the residence of Mrs. Burrus and her son and several other witnesses; and we have the testimony of life-long pilots on the river, to whom their knowledge of the channels supplied their only means of livelihood, and to whom the channels were as familiar as the English alphabet is to your honors on the bench. They had studied the "Pilots' Guide," and had such an experimental and practical knowledge of the subject as no other class of men could ever possibly possess. Besides we have the testimony of other witnesses, neither impeached, impugned or contradicted, who had intimate knowledge of the facts to which they testified. The fancied resemblance between the facts of these two cases recalls the anecdote of the widow who said to a gentleman, "You so remind me of my dear late husband." "In what respect?" he asked. "Because," she answered, "You are so unlike him."

Some parts of the testimony must have been undecisive in the mind of the court below, because in the opinion it is given out that "the evidence is very unsatis-

factory." But not on the question as to the fact that the main channel was on the east side of the island from a time prior to 1839 until 1882, that is, as long as any one can remember, because, as stated in the opinion of the court below, the evidence *conclusively* establishes that fact. (P. 93.)

The evidence then that was "very unsatisfactory," could only be that of the defendants regarding an ancient main navigable channel, a kind of lost Atlantis, of which no memorial is left. When it was formed no one knows. The shape, depth and physical conditions are lost in the midnight of legend and fable.

Steamboats, we are told, first made their appearance on the Mississippi river in 1811, only five years before the State of Misissippi was admitted into the Union. They must have been small, and few in number during some years following. There is no evidence that during that time any vessel ever went west of the island; or even one of the flat boats, the usual vessels of transportation and commerce of that day. Absolute and impenetrable darkness reigns here. All is purely matter of hopeless conjecture. Any one who has read a life of Mr. Lincoln, or the "Winning of the West," by Mr. Roosevelt, will have learned that in 1817 nearly all the commerce on the Mississippi was carried on by means of flat boats; and we have not the slightest hint to show on which side of Island 76 they pursued their perilous way.

Well might the court below say that the evidence on this branch of the case was "*very* unsatisfactory." (P. 93.)

It is very well said in the opinion of the court below that "the main channel of a river having been once established by proper proof, the presumption, in the absence to the contrary, will be that it was there before that time, and remained there since. Thus, it it being established conclusively, as found by the court, that the main channel of the river was east of this island in 1839, the presumption, in the absence of proof to the contrary, is that it was there before that time, even as early as 1802, "when the State of Georgia ceded the territory to the Government for the purpose of creating the State of Mississippi." (P. 94.)

But the opinion states that in 1846, when "the undisputed evidence shows that the channel had for several years changed to the east of the island." etc. (P. 96.)

We submit that the evidence does not show anything of the kind, either directly or indirectly; and that this is purely an inadvertent recital. There is no evidence that the channel was ever west of the island prior to about 1882.

The opinion below says very correctly:

"The 51 acres not sold by the Government (entered at Helena) were in 1859 patented to the State of Arkansas under the Swamp Land Act of September 28,

1850. The lands on the island were selected by the State of Mississippi under the Swamp Land Grant Act of 1850 on June 12, 1852, and approved as such on September 24, 1854. In 1854, before any patents to the lands had been issued by the National Government, the State of Mississippi sold these lands to W. G. Ford; *but as the lands had been sold by the Government through the Arkansas Land Office in* 1847, *no patent therefor was ever issued to the State of Mississippi, the Act of* 1850 *granting to the State only the unsold lands.*" (P. 97.)

It is clear then that the State of Mississippi never got or ever can get any title to these lands.

But the opinion then lays stress on the fact that the land on the west side of the island is higher than that on the east side; inferring that this circumstance indicates the deeper channel. This is a new principle in the law of real estate, the fallacy of which we have already exposed. "This," the opinion states, "is owing to the fact that the annual overflows of the river leave most of the sediment on the bank nearest the main channel." There is nothing to sustain the singular assumption thus made. During an overflow the water is generally of uniform turbidness; and the deposit on the bank depends on the obstructions encountered, and on eddies where the water is less violently agitated. It is manifestly impossible to judge of the depth of a stream either by its breadth or by the height of its banks.

The next assumption in the opinion is as follows:

"—As the timber cut in those days was used almost exclusively to supply steamboats with fuel, it was naturally cut near the channel which steamboats used in navigating the river, and clearings were made nearest to the boat landings, in order to enable the parties easy access to the boats, which at that time were the only means of conveyance for freights and passengers." (P. 98.)

But Miller says: "The plantations were opened by woodyards selling wood to steamers." (P. 115.) There was no plantation on the island.

The first steamboat that navigated the Mississippi was constructed at Pittsburg in 1811.

XV. Enc. American, tit. *Steam Vessels.*

They were of a different form and construction from those used on the eastern waters; and, considering the less rapid processes of those days in manufacturing such complex structures, it is hardly probable that there were many vessels of that kind on the river in 1817; and they could not have speedily superseded the flotilla of flat boats that had long monopolized the river trade; indeed they are not entirely superseded yet. In 1810 the population of the Territory of Mississippi was 40,352; in 1820 the population of the State was 75,448.

Id. tit. *Mississippi.*

The first settlers in all new countries make their homes on the sea shore, or on the great rivers, partly for

the purpose of easy communication with the ouside world. It was so in New England, in Virginia, on the Ohio, on the Thames, on the Tiber, on the Nile, on the Mississippi. The earliest traces of our antediluvian ancestors are to be found along the shores of rivers. "The timber cut in those days" was not "used almost exclusively to supply steamboats with fuel." Men were, as elsewhere under like circumstances, clearing their farms, building fences, and houses. In 1839 there was a plantation and woodyard opposite the island, Called Neblee's Landing, and one on the Arkansas shore at Rouse's Point. To suppose that the whole of the population of Mississippi in 1817 had little or no other business or employment save that of supplying the few steamboats on the river with fuel is an athletic leap in the dark. Besides it does not appear that there was any landing on Island 76, or that any steamboat ever landed there until after it was purchased by the plaintiffs. There was nothing to land there for; and the great American forest, almost unbroken, lined the river on either bank. The United States survey of 1846, facing p. 172, shows four small clearings on the western margin of the island. They are all in nearly rectangular shape, showing that they were not made by wood butchers engaged merely in supplying fuel to steamboats. There were a few inhabitants on the island when the United States Survey was made in 1846; for the field notes state that "the inhabitants of said island

vote and pay taxes in the State of Arkansas." Communication with the mainland in Arkansas was not then very difficult. The field notes say of the western channel, "Distance across obtained by calculation. This channel is wide, but in low water it is very shallow. When I passed down December 27, 1845, it was with difficulty I could get my skiff through this channel." (P. 173.) And cattle, horses and mules frequently crossed the western channel in low water. (P. 119.)

The court admit that Arkansas continuously claimed and exercised control over the island ever since 1838. (P. 108.) That is, during a period of sixty-one years.

The court finally placed its decision on the Downing letter, which is as rank a piece of hearsay as was ever presented in a court of justice. (P. 104.) Not only was it hearsay, but the writer states that he speaks solely from hearsay. He did not pretend to know anything about the matter of which he wrote, and thought that the lands were patented in 1830 or 1831. The excuse for giving desisive weight to this letter is that Downing had been *"at one time* the Surveyor General of Public Lands for the State of Mississippi!"

By final decree the court dismissed the bill for want of jurisdiction. (P. 87.) The trial judge also granted a certificate that no other question than that

of jurisdiction was passed upon or determined by the court. (P. 87.)

IV.

JURISDICTION.

The ground for jurisdiction are two fold.

1. The boundaries between the states are fixed by the acts of Congress by which they are created; hence this controversy directly raises a federal question.

U. S. v. Texas, 143 U. S., 641.

Wilcox v. Jackson, 13 Pet., 498, 518.

Shively v. Bowlby, 152 U. S., 1, 9.

Packer v. Bird, 137 *id.*, 661.

Paulet v. Clark, 9 Cranch, 292.

Colson v. Lewis, 2 Wheat,, 377.

Hardin v. Jordan, 140 U. S., 371.

Tennessee v. Davis, 100 *id.*, 258.

If a writ of error will lie to the court of last resort of a State it follows that the suit might originally have been brought in the federal courts. It is clear enough that the state courts could not enforce any decree that they might render in a case of this sort.

Diverse citizenship is not essential to jurisdiction where the parties claim lands under grants of different States.

Paulet v. Clark, *supra.*

Colson v. Lewis, *supra.*

2. The suit is also brought to quiet the title of

the plaintiffs; and as the lands lie within the district of the court below that court had jurisdiction on that ground irrespective of citizenship.

Rev. Stat., Sec. 738.

Dick v. Foraker, 155 U. S., 404.

In this case the defendants filed an answer, entered their appearance, and specially waived objections to the jurisdiction. (Tr., p. 84.)

As to the jurisdiction to quiet title, see also

Carroll v. Safford, 3 How., 441, 514.

The court below considered the answer as being only a special plea to the jurisdiction; but this, we think, was error. Defendants having voluntarily submitted to the jurisdiction of the court, it had the right to decide the case on the merits.

Blodgett, D. J., in Remer v. Mackay.

35 Fed., 86.

3 Pom. Eq., Sec. 1318.

The court below acquired jurisdiction by the seizure of the lands.

Cooper v. Reynolds, 10 Wall., 317.

Shields v. Coleman, 157 U. S., 178.

Pennoyer v. Neff, 95 *id.*, 714.

Also by personal appearance.

As the court had jurisdiction of the cause it had jurisdiction to decide it.

Windsor v. McVeigh, 93 U. S., 274.

Arndt v. Griggs, 134 *id.*, 320.

V.

BOUNDARIES.

We are satisfied that the boundary line between the States is the thread of the Mississippi River. If the western boundary of the Mississippi was at the time of her admission into the Union the eastern shore of the river, as the act of admission would seem to have intended, the act of admission of Arkansas, making her eastern line the thread of the river, had the effect to amend the former act so as to make the line identical for both States. "Where territories are co-terminous they must have a common boundary."

Coffee v. Groover, 123 U. S., 22.

This line is not changed by any later displacements of the main navigable channel of the river.

Missouri v. Nebraska, 19 U. S., 23.

Nebraska v. Iowa, 143 *id.*, 360.

Indiana v. Kentucky, 136 *id.*, 508.

VI.

LAW AS TO EVIDENCE.

In considering the evidence to the effect that from 1838 to 1882 boats went down the west channel in high water, it should be borne in mind that the range between high and low water at Memphis is 40 feet.

16 Enc. Britannica, p. 519.

Mr. Levasseur, however, gives the range as 39 feet.

Both are approximate; and the difference is of no importance. With such a tremendous flood boats could go over the banks, and in many cases over the tree tops.

Burden of Proof.

The answer in this case, though negative in form, is affirmative in substance, since it sets up a hostile claim. The plaintiffs are, in reality on the defensive, because defendants knew when they forcibly invaded the island that the effect would be to render it unsalable, leaving the plaintiffs no choice but to bring suit or abandon it.

Sharon v. Tucker, 144 U. S., 543.

Previous quiet and peaceable possession by the plaintiffs being "*prima facie* evidence of title, threw the burden upon the defendants of establishing the contrary."

Shulenberg v. Harriman, 21 Wall., 59.

Teall v. Shroder, 158 U. S., 179.

A most fundamental error in the decree below, and one that is obvious from a mere reading of the opinion, regards the burden of proof. The court treated the case as if the burden of proof rested on the plaintiffs to disprove all the allegeations of the defendants. But the production of the patents by the plaintiffs shifted the burden of proof to the defendants.

Texas Ry. v. Smith, 159 U. S., 68.

Hoofnagle v. Anderson, 7 Wheat., 217.

Hendry v. Willis, 33 Ark., 833.

Holland v. Moon, 39 *id.*, 121.

Dawson v. Purham, 55 *id.*, 290.

Boynton v. Ashabrunner, 75 *id.*, 419.

When the court announced that the evidence was "very unsatisfactory," the inevitable legal conclusion was that the decree should be for the plaintiffs; and a decree for the defendants on vague and uncertain evidence was a complete *non-sequitur*.

The bill waived an answer under oath (p. 12), and the answer was not sworn to. (P. 44.)

Tradition as evidence.

The general and controlling rule is that the best evidence existing must be produced. Owing to the immense lapse of time, no evidence can be adduced to show positively where the main channel of the river was in 1817. The reconnaisance of 1821 does not show it. It is four years after the admission of Mississippi, and there is nothing to indicate that it was intended to show the main navigable channel for commercial purposes.

The witness Captain Marshall J. Miller says that his father told him in his youth about the channel of the river as early as 1802 and continuously afterward. (P. 115.)

As the evidence of tradition may be objected to, we may inquire as to its admissibility.

This case very forcibly illustrates the necessity of admitting evidence of that kind in suits like the present.

There is no one living now who knows personally where the main channel of the river at Island 76 was in 1817. It is equally impossible to establish the fact by general reputation, which has passed away with the generation that formed it. Nothing, then, is left but tradition; and that is the best evidence because it is the only evidence. In this case we believe that it has every mark of credibility; for certainly an old pilot engaged in teaching his trade to his son would be very apt to impart all the information that he had acquired of the intricacy and perils of the river with repetition and insistence. It would be extremely strange if he had not done so. As to Captain Miller he appears to be quite above reproach; and he could have no interest in misstating the facts.

Fortunately the law on the subject is well settled.

We beg leave to invite the attention of the court to the learned opinion of Mr. J. Story in Ellicott v. Pearl, 10 Pet., 435, from which it appears that Lord Kenyon held that in controversies of a public nature tradition and reputation are admissible. Lord Ellenborough

could not understand it, but admitted that such was the law.

Finally Mr. J. Story said:

"And, indeed, the distinction seems now clearly established in England that hearsay or tradition is not admissible in cases of mere private rights; but only in cases of public rights, or those *quasi publici,* involving similar interests by a number of persons.

He adds:

"It is upon the ground of this same distinction that general reputation is admitted in England in cases of disputed boundaries between parishes and manors, because the right affects many persons, and is of public notoriety and interest to all the inhabitants of the parish or manor. (P. 436.)

The established rule was stated to be as follows: "First that the fact to which the reputation or tradition applies must be of a public nature." (P. 437.)

Certainly the present case involves a public interest to a much greater extent than that arising from a dispute as to boundaries between parishes and manors, since every taxpayer in the two States now and for all time is and will be interested in the decision now to be made.

The claim now in suit has been delayed by the defendants and by their predecessors until it cannot be satisfactorily settled either by old maps or by surveys.

We cannot prove a reputation among the dead; and the only evidence possible is that of tradition; which comes to us in this case in a very credible form.

Since the decision in the Ellicott case evidence of tradition in cases of this sort has been almost universally admitted in this country. See the many cases cited in 2 Wigmore's Evidence, Sec. 1564.

Defendants have no tradition to offer. If tradition is not admissible it may in the end be quite as well for us, as it will certainly show that the claim now advanced is so exceedingly ancient that in the very nature of human vicissitudes it cannot be proved or disproved at all; and surely where such is the case, the decision cannot be in favor of the party who has caused the delay, and whose evidence is "very unsatisfactory." In such case the party in possession has the better right.

We think, however, that evidence of tradition is admissible in cases of this kind. "Repute," "reputation" and "tradition" seem to be used convertibly in this kind of case.

28 Enc. Law, 2 Ed., 443, note 7.

See also

1 Elliott Ev., Secs. 402-3.

"Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulations of boundaries, even repu-

tation, are constantly received on the question of boundaries of large tracts of land."

Ayers v. Watson, 137 U. S., 596.

Orton v. Smith, 18 How., 266.

Hart v. Sansom, 110 U. S., 155.

Boardman v. Reed, 6 Pet. 341.

Beard v. Talbott, Cook (Tenn.) (Cooper's Ed.), top p. 142.

On the whole testimony the court below found "that the evidence *conclusively* establishes the fact that ever since 1839, and probably two or three years before that time, up to the year 1881, the main channel was *east* of the island." (P. 93.)

What is the old reconnaisance or sketch of 1821, on which defendants place their whole reliance, but a tradition?

"*Reconnaisance n.* Preliminary survey, rough sketch."

Soule's Snonyms.

Rough enough, indeed; made almost "while you wait," covering thousands of miles of winding rivers.

The tradition as to the physical use made of a river by pilots at a particular point handed down from father to son in the course of professional training is certainly quite as trustworthy as that of a sketch, selected from a lot of such, which shows that it was only intended as something temporary and provisional.

True, the old pilot, long since dead, was not sworn; but neither were the authors of this sketch long since dead also.

"But it is claimed the books and maps which antedate human testimony establish the right of Missouri to the island. If this be so, there is recent authority for saying they are unreliable."

Missouri v. Kentucky, 11 Wall., 410.

In Clement v. Packer, 125 U. S., 321, the court said:

"In Mima Queen v. Hepburn, 7 Cranch, 290, 296, Chief Justice Marshall says: 'To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. * * * Also matters of general and public history.'

"Upon the subject of boundary there is a general agreement that by the English rule, evidence of the declarations of deceased persons as to the boundary of parishes, manors, and the like, which are of public interest, is admissible, but that such evidence is inadmissible for the purpose of proving the boundary of a private estate, *unless such boundary is identical with another of public interest.* In many of the States this strict rule has been extended, and these declarations have been admitted to prove the boundaries of lands of private persons. This extension of the rule has, we

think, been sustained by the weight of authority in the American state courts, as justified upon grounds as strong as those on which the original rule rests."

VII.

THE SURVEY.

In Baxter v. Ry., 1 Black, 208, the court said:

"It is immaterial where the most usual mouth of the river was in 1821, nor whether this northern mouth was occasional, or the flow of water only temporary at particular times, and the flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river for the purposes of a survey and sale of the public land."

The court had previously said in the same opinion:

"The mouth of the river being found, establishes the southeast corner of the tract. The plat of the survey, and a call for the mouth of the river in the field notes show that the survey made in 1821 recognized the entry of the river into the lake through the sandbar in an almost direct line easterly, disregarding the channel west of the sandbar, where the river most usually flowed before the piers were erected."

A second survey of land "cannot affect the title of

the complainant as acquired from the United States under the antecedent official survey and sale."

Ry. v. Shurmeir, 7 Wall., 289.

Lindsay v. Hawes, 2 Black, 560.

McMichael v. Murphy, 197 U. S. 304.

In Horne v. Smith, 159 U. S., 40, the survey called for a corner on the "Indian River." It was held that the survey only extended to a parallel bayou, and that evidence was not admissible to show the contrary.

See also

Chapman v. Polak, 11 Pac., 768.

Shurmeir v. Ry., 10 Minn., 82, 88 Am. Dec. 59.

The field notes of the survey are admissible in evidence.

Heath v. Wallace, 138 U. S., 583.

"Because he (the Register) is directed by law to offer the lands, when sold at public sale, in half-quarter sections. To enable him to perform this duty he must know what a half quarter section is. And before he can offer a fractional section for sale, he must see that it has been subdivided, so as to enable him to offer as much of it in half quarter sections as practicable."

Brown v. Clements, 3 How., 664.

If the law were otherwise, then.

"The patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognized

in one suit and rejected in another; and, if his title were maintained, he would find his land located in as many different places as the various prejudices, interests or notions of justice of witnesses and jurymen might suggest."

Beard v. Federy, 3 Wall., 492.

"And in the nature of things a survey made by the government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys; and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to question, interminable confusion would ensue."

Russell v. Land Grant Co., 158 U. S., 258.

As a deposition the survey "presents the facts in a more satisfactory manner than could be done by the opinion of witnesses. It makes certain that which before rested on opinion."

Garnett v. Jenkins, 8 Pet., 86.

In making the government survey Pelham must have been on the island and vicinity for some time; and there were many people then living thereabout and navigating the waters who knew whether the commercial channel had changed since 1817. He is presumed to have

known the law; and in point of fact he did know the law. Within his own special domain he knew it better than did John Wilson or Thomas A. Hendricks, successively Commissioners of the General Land Office, who both supposed that the State line followed the widest channel without regard to depth or navigability, and that it could be definitely ascertained by merely looking at a map. (Pp. 69, 70.)

VIII.

THE PATENTS.

The effect and construction of a United States land patent must, in the very nature of the subject, be a question for the United States courts to determine for themselves, without reference to the rules of construction adopted by the States for their grants.

Lurton, C. J., in Scranton v. Wheeler,
57 Fed., 811.

The question as to boundaries between the States is not governed by the local law.

Martin v. Waddell, 16 Pet., 367.

The decision of the Land Department that lands are Swamp and Overflowed Lands is final and conclusive.

Rogers Locomotive Works v. Emigrant Co.,
164 U. S., 560.

Heath v. Wallace, 138 *id.*, 573.

Wright v. Rosebery, 121 *id.*, 509.

The only difference is that in those cases the Land Department must pass on the question of the locality of the water lying on land horizontally, while in the present case it must pass on water lying vertically, and assuming the shape of a river.

The same rule of conclusiveness applies to the judgment of the Land Department as to mineral lands.

Burden v. Northern Pac. Ry., 154 *id.*, 329.

And so of pre-emption or homestead rights.

Moran v. Horsky, 178 U. S., 211.

And as to missionary stations.

Bishop of Nesqually v. Gibbon, 158 *id.*, 166.

And so as to occupation and settlement.

Dow v. Bowman, 176 U. S., 413.

And as to boundaries of a land grant.

Gardner v. Bonestell, 180 *id.*, 362.

"The adjustment of these claims, and their definition by the prescribed surveys and plats, establishing them in their appropriate locations within the limits of the original grant, *and all questions of possession, of boundary,* and of conflict, constitute a part of the administration of the law confided to that branch of the Executive Department."

Craig v. Leitensdorfer, 123 *id.*, 205.

A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles until it is set aside or

annulled by some judicial tribunal in a direct proceeding for that purpose.

Moore v. Robins, 96 U. S., 533.

With the patent passes away all authority or control of the executive department over the land, and over the title which it has conveyed.

Id.

Noble v. Union River Logging Ry., 147 *id.*, 175.

Hardin v. Jordan, 140 *id.*, 400.

It follows that the letters of the United States Land Officers embraced in the transcript are wholly irrelevant, except as showing that the State of Mississippi years ago, was fully advised of the situation from a legal point of view, as affecting the questions of acquiescence and prescription.

The cases holding that in the absence of fraud or mistake the decisions of the land officers in issuing a patent, being quasi udicial, are conclusive, are exceedingly numerous.

U. S. v. Minor, 114 U. S., 243.

Calhoun v. Violet, 173 U. S., 63.

School of Magnetic Healing v. McAnnulty, 187 *id.*, 94.

DeCambra v. Rogers, 189 *id.*, 122.

Bates Co. v. Payne, 194 *id.*, 108.

Cragin v. Powell, 128 *id.*, 698.

Otherwise the confusion and uncertainty of titles and possession would be infinite.

U. S. v. Arredondo, 6 Pet. 727.

Other citations are unnecessary.

"The principle is well settled * * * that a patent is unassailable by any title commenced after its emanation."

Hoofnagle v. Anderson, 7 Wheat., 217.

The title of the plaintiffs rests on the patents of 1848, the defendants' claim originated in the tax sale of August 10. 1899.

A patentee may be held to be a trustee for an adverse claimant on the ground of fraud and mistake. Fraud must be distinctly charged, and the facts and circumstances constituting the fraud, must be specifically set out.

Moore v. Green, 19 How., 72.

Lalone v. U. S., 164 U. S., 25.

Fraud must be clearly proved, and it is not sufficient to prove it by a preponderance of evidence.

Id.

When it is alleged that fraud has been used in the issue or obtaining of a patent the facts "must be clearly established by evidence entirely satisfactory to the court."

U. S. v. Silver Mining Co., 128 U. S., 676.

The same rules apply of course to the law of mistake. To correct any written instrument the evidence

must be clear; and particularly where the result may affect the rights of an innocent purchaser.

The defendants are estopped from attacking either the survey or the patents.

More v. Steinbach, 127 U. S., 83.

Doe v. Wilson, 23 How., 458.

Any objection to the decisions of the Land Department must be sustained in "the most clear and decided manner."

Maxwell Land Grant Case, 121 U. S., 380, 381.

U. S. v. San Jacinto Tin Co., 125 *id.*, 300.

U. S. v. Budd, 144 *id.*, 154.

It is not sufficient to allege that the plaintiff has no title.

Quinby v. Conlan, 104 *id.*, 426.

Or that the Land Officers were in error in adjudging the title to the patentee.

Bohall v. Dilla, 114 *id.*, 47.

Burfenning v. Ry., 163 *id.*, 321.

Shepley v. Cowan, 91 *id.*, 330.

2 Pom. Eq., Sec. 776.

Entries on public lands after the issue of a patent are inadmissible.

Stringer v. Young, 3 Pet., 337.

Does the principle apply to the present case? We think so. We amit that if lands lying in Michigan were entered in a land office in Arkansas, and a patent should issue on such an entry, the patent would be void. But

that is not this case. Here was a real question to be decided. A survey that did not show the boundaries of sections and townships bordering on the State lines, with their contents, would have been so imperfect that it could not have been approved. There is no more authority for rejecting the exterior lines of a survey than there is for rejecting the interior lines. Indeed the permanency and notoriety of a State line are of far more importance than any others.

"Sec. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require."

Rev. St., U. S.

Not only must the boundaries of each section, half section, and quarter section be shown, but also the contents of each.

Id., Sec. 2396.

And so the description of the lands contained in the patent is conclusive.

Doe v. Wilson, 23 How., 457, 463.

Crews v. Burcham, 1 Black, 367.

The ascertainment of the boundaries of the State was an indispensable part of the surveys; and no one except the Public Surveyor could perform that important service. In doing so he was acting as much in a *quasi* judicial capacity as when meandering lakes, or performing any other duty.

The rule as to conclusiveness applies also to Mexican land grants.

Moore v. Steinbach, 127 U. S., 83.

"The grant was not one of quantity, but by metes and bounds; and the final survey, approved by the Land Department, determined *conclusively* the exterior boundaries of that grant.

In that case the court added:

"A call for a natural object in a survey controls both course and distance; and there "is no sound reason for the distinction between a call for a river at the end of a line, and for a river in the course of the line."

Newsom v. Pryor, 7 Wheat. 12.

Brown v. Huger, 21 How., 321.

"A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance."

St. Clair v. Lovingston, 23 Wall., 62.

Entries made on public lands subsequent to patent cannot affect the title.

Stringer v. Young, 3 Pet., 337.

U. S. v. Stinson, 197 U. S. 200.

A party claiming as against a patentee may, if he have sufficient equities, bring a suit in equity in order to charge the patentee as a trustee for his benefit, or he may apply to the officers of the government to bring a suit to annual the patent; which they may do; but they are not clothed with power to set the patent aside.

Steel v. Smelting Co., 106 U. S., 447.

Unless in cases of fraud the decisions of the public surveyor upon equities of claimants are always conclusive.

Haydel v. Defresne, 17 How., 30.

In addition to the effect of the patent it must be remembered that the return of a surveyor general and his plats and certificates have the force and character of a deposition.

U. S. v. Low, 16 Pet., 166.

U. S. v. Hanson, *id.*, 200, 201.

No deposition could be more convincing. That of a sworn officer of the law, wholly disinterested, qualified for the performance of the duties entrusted to him, one who has made a painstaking and careful survey on the spot, and has made a permanent record of the results of his inquiries, which is examined and approved by the Land Department, remaining unquestioned for more than half a century must be received with the highest

respect. It is not only a written record, but it is one prepared with the highest degree of care and skill for a perpetual memorial.

"The private knowledge of a few particular persons who may know the spot thoroughly, is by no means equal to the authentic information which an actual survey, a regular report, and a correct record, can convey; and the instances are so very few, where exact information can otherwise be obtained, that there is no occasion for the sake of those to make an exception."

Sims. v. Irvine, 3 Dall., 462.

"There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy between neighbors the accuracy of a survey made by the government were open to questions, interminable confusion would ensue."

Russell v. Maxwell Land Grant Co.,

158 U. S., 258.

"The Land Department found and adjudged not only that the land in controversy was outside the exterior boundaries of the grant, but also that Throckmorton was not a purchaser in good faith. Both of these findings were matters of fact and based upon the testimony. No proposition of law controlled such find-

ings, and no error of law is apparent. Both questions of fact were determined by the Land Department adversely to the plaintiffs in error, and that determination concludes the courts. Counsel insists that there was no conflicting testimony. He ignores the survey which is in itself evidence, and that of a most persuasive kind. There are many things which a surveyor sees and finds in making a survey which are not and cannot be reproduced on paper, and which yet guide him, and wisely guide him, in the lines he runs. So that even in a case in which a survey is a proper subject of attack, it can be overthrown only upon satisfactory evidence of mistake. It cannot be ignored, and the only matter considered should be the tendency and significance of the oral testimony of witnesses as to lines, metes and bounds."

Congress has made provision "for the survey and sale of the public lands bordering on public navigable rivers, and the legal construction of the patents issued under such official surveys."

Gardner v. Bonestell, 180 U. S., 362, 379.
Ry. Co. v. Schurmeir, 7 Wall., 288.

IX.

ACQUIESCENCE—PRESCRIPTION.

If the defendants are disposed to criticise some of our witnesses on account of their old age, they will find that this is a sword that cuts both ways. The defend-

ants in their irruption into the island were both too early and too late. Too early, because there were still a few survivors of a past generation who remembered important facts bearing on the case, though doubtless defendants supposed them all to be dead; too late, because the bar of prescription had already attached.

In considering the effect of the lapse of time on a suit of this kind it has been often said that each case must depend on its own peculiar circumstances; hence precedents are not conclusive; but it will clearly be seen, we think, that this is a plain case for the application of all rules intended to restrict litigation, and to secure the repose of mankind, heretofore adopted.

Laches and prescription are convertible terms. Whatever one loses by laches some one else gains by prescription; otherwise the title would remain in abeyance.

Toltec Ranch Co. v. Cook, 191 U. S. 532.

Campbell v. Holt, 115 U. S., 622.

Sharon v. Tucker, 144 *id.*, 543.

Jacks v. Chaffin, 34 Ark., 541.

Townsend v. Johnson, 9 How., 417.

"While the words 'laches' and 'acquiescence' are often used as similar in meaning, the distinction in their import is both great and important. Laches imports a merely passive, while acquiescence implies active, assent; and while, where there is no statutory limita-

tion applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet where there is such a statutory limitation they will not anticipate it, as they may where acquiescence has existed."

Wood on Limitations, Sec. 62.

At common law there was no period of limitation except in the single instance of a fine with proclamations.

Id., Sec. 2.

The first English statute was passed in the reign of Henry VIII. It fixed the period of sixty years where the claim was upon the seisin of ancestors or predecessors in possession at the time of the passage of the act.

As to several forms of action, now obsolete, it made the period fifty years.

Then for all other actions the period was thirty years.

Id., p. 629, Appendix.

Missouri Territory, of which Arkansas formed a part, was organized June 4, 1812.

2 U. S. Stat. at Large, p. 743.

Mississippi Territory was organized April 7, 1798.

Id., p. 549.

The State was admitted into the Union in 1817.

There is not a syllable of testimony to show that

either the Territory or the State of Mississippi ever made any claim to Island 76. There is no evidence that any person claiming to be a citizen of Mississippi Territory or State ever lived there, or owned any land there, or that any writ from that Territory or State was ever served there, until the defendants broke this long record of a century; and it is manifest that the individual action of Currie & Hull and of the defendants in this suit has had no higher motive than that of speculative gain.

In England the period of limitation as to the King was sixty years. He could do no wrong; and hence could not be guilty of laches; but all conquering Time would tell on him at last. The reason of the extension was that "the time and attention of the sovereign must be supposed to be occupied by the cares of government."

Broom's Leg. Max., 65.

There is no reason for such a rule in this country. No doubt some enlargement may be allowed for sovereign States. But we must not fail to distinguish between time and eternity; and whatever exceeds the span of individual life falls within the latter classification.

"Sixty years" is practically equivalent to seventy-five or eighty years, since boys and girls usually have but little or no knowledge of business transactions such as usually demand the attention of courts of justice.

All of our statutes of repose in this country—especially in the newer parts of it—are short. As all writs of subpoena stop at the gate of the cemetery, the rule laid down by the court below would paralyze the arm of justice in all cases of this kind.

The acts of the legislature and the provision of the Consitution of Mississippi concerning its boundaries could in no wise affect the rights of the plaintiffs, as they were under no obligation, either legal or moral, to read the legislative acts of another State. In order to counteract the operation of the principles of laches and acquiescence the State would have to take steps to assert a right of sovereignty over the island in a legal manner. Merely passing statutes would no more affect residents of other States than they would affect the attraction of gravitation. They could not amount to any claim to the island, and evidently were not so intended. They were notice to the citizens of the State; but to all the world besides they were nothing.

Pennoyer v. Neff, 95 U. S., 722.

It is impossible to regard these acts of the legislature and this constitutional provision as making any *claim* on Island 76.

"What is a claim? It is, in a just judicial sense, a demand of some matter *made by one person upon another,* to do or to forbear to do some act or thing as a matter of duty."

Prigg v. Pennsylvania, 16 Pet., 615.

"The mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded."

Mackall v. Casileur, 137 U. S., 567.

Gildersleeve v. New Mexico Mining Co.,

161 *id.*, 579.

So far as the judgment of the court below is based on the constitutional and legislative acts of Mississippi (p. 106), it is erroneous.

No State has any extra-territorial jurisdiction.

Wilson v. Seligman, 144 U. S., 44.

Goldey v. Morning News, 156 *id.*, 521.

Hoyt v. Sprague, 103 *id.*, 521.

The delay in making any claim in this case, even if made by the State of Mississippi, would necessarily bar any relief. If acquiescence is not clearly established in this case then acquiescence must be a name for a thing that does not exist, or is so rare as to be practically non-existent.

In Hadley v. Anthony, 5 Wheat., 384, the court said:

"It is a fact of no inconsiderable importance in this case that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned State. No diversity of opinion

appears to have existed on this point. The water on the northwestern side of the land in controversy seems not to have been spoken of as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the northwestern side of the Ohio, and being a part of Indiana."

"While time is constantly destroying the evidence of rights they supply its place by a presumption that renders proof unnecessary."

Wood v. Carpenter, 101 U. S., 139.

Statutes of repose are now favorably regarded.

Leffingwell v. Warren, 2 Black, 606.

The bar of the statute confers a positive title.

Morgan v. Ry., 96 U. S., 722.

Elliott v. Pearce, 20 Ark., 508.

Walker v. Towns, 23 *id.*, 147.

"It has been a recognized doctrine of courts in equity, from the very beginning of their jurisdiction, to withhold relief from those who have delayed for an unreasonable length of time in asserting their claims."

Lansdale v. Smith, 106 U. S., 392.

Jenkins v. Pye, 12 Pet., 262.

O'Brien v. Wheelock, 134 U. S., 495.

Thirty-two years is an unreasonable time.

Strother v. Lucas, 6 Pet. 772.

U. S. v. Hughes, 13 How. 4, 14.

"Where the lien is to be enforced *to the detriment of a purchaser for value,* without notice of the lien, the defense (of laches) will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued."

The Key City, 14 Wall., 660.

Innocent purchasers are always entitled to the protection of the court.

Cragin v. Powell, 128 U. S., 699.

"From the earliest ages, courts of equity have refused their aid to those who have neglected for an unreasonable length of time, to assert their claims, especially *where the legal estate has been transferred to purchasers without notice."*

Elmendorf v. Taylor, 10 Wheat., 168.

"The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never."

Patterson v. Hewitt, 195 U. S., 317.

"Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions; it oper-

ates by way of presumption in favor of the party in possession."

Wagner v. Baird, 7 How., 258.

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose, and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

Brown v. Buena Vista County, 95 U. S., 161.

"But if in this respect there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved

with greater justice and propriety than in a case of disputed boundary."

Rhode Island v. Massachusetts, 4 How., 639.

"Independently of any effort due to the compact as such, a boundary line between the States and provinces, as between private persons, which has been run out, located and marked upon the earth (as in the United States Survey by Pelham in this case), and afterwards recognized and acquiesced in by the parties by a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the course given in the original grant; and the line so established takes effect not as an alienation of territory, but as a definition of theh true and ancient boundary."

Virginia v. Tennessee, 148 U. S., 522.

In the case of Missouri v. Kentucky, 11 Wall., 402, the court said:

"This possession, fully established by acts like these, has never been disturbed. If Missouri has claimed the island to be within her boundaries, she has made no attempt to subject the people living there to her laws, or to require of them the performance of any duty belonging to the citizens of a State. Nor has there been any effort on her part to occupy the island, or to exercise jurisdiction over it. If there were proof that the island, by legislation, had been included in the limits of New Madrid County, then the service of a writ in

1820, on the solitary settler there by the sheriff of the county would be an exercise of sovereign power on the part of the State. But in the absence of this proof, there is nothing to connect the State with the transaction, or from which an inference can be drawn that the sheriff was authorized to go on the island with his process. And for the same reason, it is hard to see how the fact, conceding it to be true, that a person occupying the position of a circuit judge of Missouri, once lived on the island (when, or how long, we are not informed), tends to show that the State intended to take possession of it."

The opinion of the court below states:

"The authorities do not agree as to the length of time for which such acquiescence must continue before there will be a loss of jurisdiction. Some eminent writers on international law have suggested a period of fifty years; but I am of the opinion that the safest rule to adopt would be that of the common law, that in order to acquire title by prescription the exercise of ownership must have been for such length of time that the memory of man runneth not to the contrary." (P. 102.)

That is, until every one knowing anything about the facts is dead. This is not a case involving any principle of international law; and this court has always been open to the State of Mississippi to adjudicate any claim that she might prefer. This rule of sixty years

might have been a very good one in the days of Methuselah, when a man nearly a thousand years old could call in his neighbors who had been the companions of his boyhood; but now when individual life is merely an infinitesmal speck in the infinitude of space, it can hardly be commended. Laches and acquiescence are well known doctrines in courts of equity. They are applied according to the circumstances of each case; and the courts have no power to enact definite and special statutes of limitation.

The period of limitation for lands in Arkansas is seven years.

Dig. Statutes, 1904, Sec. 5056.

That of Mississippi is ten years.

Wood on Limitations, p. 741.

If the doctrine of laches does not apply in this case it is evident that the real period is such as to render the doctrine useless.

In other words, it is not applicable to our present state of existence.

Thirty-six years possession barred an adverse claim in U. S. v. Hughes, 13 How., 1, 4, 5.

"The delay of thirty years is such a delay as a court of equity forbids."

U. S. v. Des Moines Co., 142 U. S., 540.

And so of twenty-seven years.

Wehrman v. Conklin, 155 *id.*, 332, 333.

So of forty-five years.

U. S. v. Beebee, 127 *id.*, 347, 348.

So of forty years.

Clark v. Boorman, 18 Wall., 509.

So of fifty years.

U. S. v. Moore, 12 How., 222.

So of twenty-five years.

U. S. v. McLaughlin, 30 Fed., 147.

The defendants cannot defend by showing a title in the United States or another.

Croft v. Merrell, 14 N. Y. (4 Kern.), 460.

Wilson v. Madison, 55 Calif., 5.

Brenner v. Bigelow, 8 Kan., 496.

Harney v. Morton, 36 Miss., 411.

Western v. Estey, 22 Colo., 334.

Wilder v. St. Paul, 12 Minn., 192.

The defendants claim under a tax title; but if the lands belong to the United States they have never been taxable.

Van Brockelin v. Tennessee, 17 U. S., 168.

The court below thought that sixty years would be a convenient little period; but that period has been expressly stigmatised as absurd by this court.

"The fiction of presuming a grant from twenty years possession or use was invented by the English courts in the eighteenth century to avoid the absurdities of their rule of legal memory, and was derived by anal-

ogy from the limitation prescribed by the St. of 21 Jac. I., ch. 21, for actions of ejectment."

Fletcher v. Fuller, 120 U. S., 547.

A period of sixty years would be, in the great majority of cases, practically the same as one of a thousand years.

In the case just cited the court also said:

"Where any proprietary right is exercised for a long period, which, if not founded upon a lawful origin, would in the usual course of things be resisted by parties interested, and no such resistance is made, a presumption may be indulged that the proprietary right had a lawful origin." (P. 551.)

The long continued possession of the plaintiffs and their predecessors in title is sufficiently shown.

Simmons Coal Co. v. Doran, 142 U. S., 443.

Possession proved to exist is presumed to continue.

Lazarus v. Phelps, 156 *id.*, 205.

Every possession is presumed to be lawful until it is shown to be unlawful.

Ricard v. Williams, 7 Wheat., 107.

"In favor of long possession, in favor of strong apparent equity, much may be presumed."

Blight v. Rochester, *id.*, 546.

Shulenberg v. Harriman, 21 Wall., 50.

Possession is presumed to follow ownership.

Gonzales v. Ross, 120 U. S., 629.

"Property is not usually suffered to remain for long periods in the quiet possession of any one but the true owner."

Oaksmith v. Johnston, 92 *id.*, 345.

So far as the questions depending on the lapse of time are concerned, this case is singularly like that of Indiana v. Kentucky, 136 U. S., 508.

In some respects that is not so strong a case for the occupant as this, since the proof of long acquiescence, evidenced by repeated acts of the greatest solemnity, which especially mark the present litigation, are wholly wanting in that. Unless overruled, that decision disposes of the present controversy.

"Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession which will appeal to the conscience of the chancellor."

Abraham v. Ordway, 158 U. S., 421.

"The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions have become so obscured by time as to render the ascertainment of the exact facts impossible."

Hammond v. Hopkins 143 *id.*, 250.

Baker v. Cummins, 169 *id.*, 208, 209.

Of course, increase in values is an important consideration.

Gallaher v. Cadwell, 145 *id.*, 372.

Arkansas v. Underhill, 1 Black, 325.

"Long possession is, nevertheless, a strong weapon of defence in the hands of one who can show reasonable proof that the title of the government has been parted with, and has devolved on him."

Hedrick v. Hughes, 15 Wall., 123, 131.

A grant, after long possession, will be presumed in ordinary private litigation. A larger period may be allowed on the claim of a sovereign State; but where one had a Mexican grant in due form a lapse of more than fifty years was held to confer a good title.

U. S. v. Chaves, 159 U. S., 462.

"If a claim could have a legal commencement the juries are advised or instructed to presume such commencement after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment accompanied by the usual acts of ownership."

U. S. v. Chavez, 175 U. S., 522.

There is no need of presumption of a grant in this case.

Our contention is that the question of laches and limitation are only of subordinate importance in this case. Holding under a patent, the highest title known to the law, the plaintiffs have no need of such extraneous aid. If the defendants had enjoyed a sufficiently long continued possession they might have set that up as against the patent. Our contention is that long acquiescence can only be explained on the theory that it was for a long period universally conceded that the east channel was the dividing line between the States; an admission that had satisfactory foundation in the survey and patent.

We venture to think that a fatal error in the reasoning of the court below is to be found in treating two matters separately that are in their nature inseparable. First the court found (as it seems to us without any evidence of value) that the main channel of the river in 1817 was west of the island, *and then* proceeded to inquire whether the plaintiffs had acquired title by reason of long possession; whereas long possession afforded very strong proof that the channel was not west of the island, but was as shown in the United States Survey, because otherwise no reason for such long acquiescence is supplied by the evidence. Stronger proof in fact could hardly be adduced.

That the decision of the cancelling board was apt to be correct stands upon a strong presumption. The

members of the board were specially chosen for the duty assigned them.

Having lived long in the State, and, no doubt, having often visited every part of it at different periods, so as to make themselves familiar with its geography and topography, having had constant opportunities of conversing with the oldest inhabitants, it cannot be denied that they possessed larger opportunities than we have, or that they possessed much information that is inaccessible to us.

In all cases in which claimants have been debarred by lapse of time few of the judgments have been so plainly demanded by all the circumstances as that at present invoked by the plaintiffs. True, in some of the cases the delay has been longer, but they lacked the important element of acquiescence that is so conspicuous here.

In Mississippi in case lands are improperly placed on the assessment list the statute provides as follows:

"If the land be sold for taxes when no taxes are due on it, or it is not liable to be sold for taxes, the sum paid by the purchaser for the amount of his bid, and the costs of the sale and conveyance, with six per centum interest per annum, shall be refunded to him, or the holder under him by descent or purchaser, mediately or immediately, by the State or county respectively, in proportion to the amount received by

each; *and in such case the claim against the State shall be audited and allowed by the auditor of public accounts on due proof, with the approval of the governor and the attorney general,* and he shall draw his warrant on the treasurer for the amount shown to be due; and the claim against the county in such case shall be allowed by the board of supervisors of the county, and paid out of the county treasury on the certificate of the auditor of public accounts of the refunding of the State tax. If in such cases, the money paid by the purchaser be not paid into the State and county treasuries, the collector shall be liable on his official bond to the purchaser for the amount so paid, and twenty-five per centum interest per annum on such sum, and the State and county shall not be liable. The provisions of this section shall extend to taxes collected for levee purposes where land is improperly sold, and the amount due in such case shall be paid to the proper person by the levee treasurer on the order of the levee board."

Annotated Code of Mississippi, 1892, Sec. 3831.

See opinion of the court below, p. 107.

It has often been decided by this court that where a special tribunal is authorized to hear and determine certain matter arising in the course of its duties its decisions within the scope of its authority are conclusive.

Johnson v. Towsley, 13 Wall., 72.

Turning to p. 292 of the transcript we find that the State of Mississippi conveyed the lands to W. G.

Ford January 9, 1854, fifty-three years ago. On the 29th April, 1859, Ford wrote to Gov. McWillie, enclosing the Downing letter, and urging him to secure a patent for him. (P. 68.) The governor accordingly wrote to the Commissioner of the General Land Office May 3, 1859, and a correspondence ensued; but no information was obtained of any fact that would tend to support Ford's title. After a full investigation, as we must suppose, Ford abandoned his claim; for his name does not appear again on the abstract of title.

The next conveyance is that of J. J. Ross to Clark and Stark. Who they were does not appear.

On January 9, 1857, J. J. Ross mortgaged the lands to Charles Clark and Peter B. Stark. The mortgage recites that the lands had "been conveyed to the said J. J. Ross by the State of Mississippi." (P. 294.) There is no evidence that Ross ever had any title. What became of the mortgage does not appear.

Then the lands were assessed in the name of "Unknown Owners," (p. 125) were declared delinquent, and were forfeited to the State for non-payment of taxes of 1881 (p. 125), and were sold and conveyed by the State to Currie & Hull September 28, 1891. (P. 125.)

On the 28th January, 1892, J. T. Williams conveyed the lands to Currie & Hull. (P. 298.) It does not appear that Williams ever had any interest in the

lands. On the 28th March, 1892, Currie & Hull executed a deed of trust on the lands to F. E. Larkin. What became of that does not appear.

The date of the forfeiture to the State was March 6, 1882, and Currie & Hull bought from the State October 26, 1891. Currie & Hull, having had time for examination, discovering that they had secured no title, applied to the proper board, consisting of the Governor, Auditor and Attorney General, to have the sale cancelled, and for a return of the purchase money; and the prayer was granted November 23, 1892. (Pp. 126, 143.) At the time that this finding was made T. M. Miller was Attorney General. (P. 140.) As we have seen, his successor Frank Johnston decided the same way.

On the 6th April, 1894, Edward A. Bowers, Assistant Commissioner of the General Land Office, wrote to Frank Johnston, Attorney General of Mississippi, in answer to a letter from him, that the lands lay in Arkansas. (P. 66.)

It will be seen that all the tracks go the same way. Every kind of pretence that the island was in Mississippi had faded out. But men spent several hundred years hunting for the philosopher's stone; and men will probably be searching for the lost treasures of Captain Kydd until the crack of doom.

It could not have been a very hard thing to get the lands placed again on the assessment list of Bolivar

county. Gathering in the taxes was the business of the assessor; not to ask the reason why. Most probably he knew nothing about the previous cancellation of the deed to Currie & Hull, and knew nothing of the channel of the river. Anyway the assessment would do no harm. It would not require any great strain to suppose that the revival of this old claim was due to those who now wish to profit by it, seeking to reap where they have not sown, to gather where they have not strewn. While resolving to fathom the remote past upon which the pall of oblivion had well nigh settled, they were not unmindful of modern roads that have often led to success, though not always to peace and right living. "Let us combine," they said; and they combined, and pooled their claims. (P. 52.)

As to the action of the refunding and cancelling board in cancelling the purchase of Currie & Hull, we shall not say that it is absolutely conclusive. It might be set aside for fraud or mistake. It is clear that Hubbard v. Garfield, 102 Mass., 75, cited by the court below, has no bearing, because in the very extract quoted in the opinion (p. 109), it is stated that "the law in question expressly gives the power of re-assessment to the assessor for the time being."

Lemly v. Commissioners, 85 N. C., 379, only holds that a board may rescind one of its own orders on finding that it was made by mistake.

In People v. Roberts, 155 N. Y., 408, 413, there was no board; and it was held that one assessor was not estopped by the action of his predecessor.

These cases, cited in the opinion of the court below, (pp. 109, 110) shed no light on the question.

In this case there has been no reversal of the action of the board, and its judgment remains in full force and effect. And, besides, defendants hold under a deed from Curry & Hull, and hence are in privity with them (see answer, p. 44); with the very persons at whose instigation the cancellation was made.

We see that it was forty-six years after the admission of Arkansas into the Union before any of the lands in controversy were placed on the assesment books of Bolivar county in Mississippi. Then no one would buy them even for the taxes. They were forfeited to the State; upon which Currie & Hull mustered up courage, and bought them from the State. Finding that they had obtained no title they later applied to the proper board, asking that the sale might be cancelled; and on full consideration the sale was accordingly cancelled, and the purchase money was refunded because the lands lay in Arkansas. No one appeared either for the patentees, or their successors in title, or for Arkansas; and the decision must have been wholly unbiased. The inquiry set on foot by Ford resulting in the correspondence with the land officers must have terminated in the same way.

One cannot read this transcript without perceiving that the attitude of the State of Mississippi throughout has been eminently honorable, and perfectly consistent from the very beginning down to this hour. If, according to the best lights that could be obtained, it had appeared that the island belonged to her, it would have been natural, and even praiseworthy, for her to claim it. Being convinced that she had no claim, she cannot be regarded as being guilty of laches. Her conduct was simply the expression of a deliberate and honest conviction that she had no just claim to these lands. Certainly this long and unvarying record affords a very strong presumption that the facts demanded just that kind of acquiescence that was thus exhibited. Had there been any real dispute no doubt it would have been duly adjusted long ago. The evidence is clear that no such dispute ever existed, and that no such dispute exists now.

No doubt the legal advisers of the State of Mississippi knew the law applicable to cases of this sort and acted accordingly.

But if the case had been one of laches only the finding would not be different.

It may be said that these officers had no authority to change the boundary of the State. But the fact remains that the legislature and all departments of the State Government acquiesced during many years; and

"the presumption is that the legislature will not delay to do that which it ought to do."

Inglis v. Trustees of Sag Harbor, 3 Pet. 144.

But in this case the legislature had expressly delegated the power to decide all questions of this kind to the Governor, Auditor and Attorney General without appeal. This was a judicial tribunal. In a case involving a State boundary this court said:

"The State of Virginia is *de facto* in possession of the territory in question. She has been in possession, and her title and possession have been undisputed since she resumed possession in 1847, pursuant to the act of Congress of the preceding year. *More than a quarter of a century has since elapsed.* During all that time she has exercised jurisdiction over the territory in all respects as before she ceded it to the United States. She does not complain of the retrocession. The political departments of her government by their conduct have uniformly asserted her title; and the heads of her judicial department have expressly affirmed it. The United States have not objected. No murmer of discontent has been heard from them."

Phillips v. Payne, 92 U. S., 132.

In the same case the court said:

"The law of prescription applies to nations with the same effect as between individuals. * * * For

certain purposes the States of the Union are regarded as foreign to each other." (P. 132.)

It may be said that the sovereignty of the State of Mississippi never resided in the cancelling board. To this we reply, "The State is but a political corporate body, and can only act through agents."

Poindexter v. Greenhow, 114 U. S., 288.

"And it would be absurd to say that any act was not done by a State which was done by its authorized agents."

Briscoe v. Commonwealth Bank, 11 Pet. 318.

"The solemn act of a State, which has been sanctioned by all the branches of its power cannot under any circumstances be lightly regarded."

Craig v. Missouri, 4 Pet., 458.

X.

DEFENDANTS HAVE NO STANDING IN COURT.

As no patent has ever issued from the United States to the State of Mississippi, the defendants are not in a position to contest the title of the plaintiffs.

Stringer v. Young, 3 Pet. 337.

Chotard v. Pope, 12 Wheat., 590.

Carroll v. Safford, 3 How., 461.

There is no charge of fraud or unfairness.

Lytle v. Arkansas, 9 How., 335.

The Swamp Land Act of September 28, 1850, only granted lands "which shall remain unsold at the passage of this act."

The defendants have no standing in court unless they can show a prior right.

Schaer v. Gliston, 24 Ark., 137.

Holland v. Moon, 39 *id.*, 120.

Miller v. Gibbons, 34 *id.*, 213.

Dewees v. Reinhardt, 165 U. S. 392.

A mere intruder without title cannot attack the judgment of the Land Department.

Ehrhardt v. Hogaboom, 115 U. S., 69.

Bates v. Ry., 1 Black, 208.

The defendants show no interest in the lands whatever. The State of Mississippi could only acquire title by patent; and as a patent has already issued no patent can never be issued to that State.

Rogers Works v. Emigrant Co., 164 U. S., 570.

The defense partakes largely of the burlesque; an effort to introduce a new form of extra-territorial and insular expansion, exhibiting the extreme results of the modern commercial spirit, seeking money by rapid and novel expedients. There had never been any dispute about the State line as between the two States. It was Currie & Hull that first thought of expansion by tax title; but after inquiry and deliberation they were fain to abandon what had seemed a flattering hope, and

to get back the small sums that they had put into the venture.

The defendants hearing of this fiasco, and trusting in their own superior astuteness and sagacity, seized upon another tax title as a practical lasso for lands in Arkansas.

Nothing could be more unjust. Plaintiffs lived in Illinois, and had not the slightest notice of this contemplated grab game. Finally when the defendants had got their deed they pooled their issues, sent an armed man to take possession, and brought various suits against the plaintiffs in Bolivar county, Mississippi, and sent writs over to the island, the first known coming from that State; and had them levied on this "isle of beauty." Never since the foundation of the world had such a thing been known.

Now the defendants masquerade as clothed with all the sovereignty of the great State of Mississippi. In like manner the three tailors in Tooley Street issued a proclamation in which they styled themselves, "We, the people of England."

It would be difficult to imagine anything more absurdly spectacular. In order to indulge in such an impracticable scheme one must have had a yearning for the government of islands far exceeding that of Sancho Panza himself.

And what will defendants do with the island if they get it? They may convey it to Mississippi; but they will not be bound to do so. And even that would not settle the boundary. Mississippi, to be consistent, could not accept the island. She could not sue defendants for it, because she has deliberately sold and conveyed it to them; and though this was not done for the purpose of encouraging fillibustering on contigious territory, she would be estopped from further interference. Then would the prophecy of the Hon. Jacob Thompson be fulfilled, and the island would belong to neither State; but would be *Imperium extra imperio.*

This business of snaring adjacent islands and contiguous territory is just now in its infancy; but, if properly fostered it may in time amount to something worth while. Repeated snatches of this sort may result in such verdicts and judgments in the course of years as to make our State lines in their zigzag variations resemble an old fashioned Virginia rail fence; but this will only make a stronger appeal to lovers of the romantic and the picturesque. There may be an element of injustice in it. When a mistaken State line is corrected on a re-survey, a citizen may have his allegiance transferred; but ordinarily he will not lose his lands. In this case, however, the proposed change of the line would have the effect to confiscate the lands of the plaintiffs. This may not seem just; but perhaps diligent search in ancient

chronicles might show precedents in which various nationalities have enacted a part not altogether different; and "what Cato did and Addison approved cannot be wrong."

This court, however, has not taken such latitudinarian views of this question.

The boundary of a State intimately concerns her sovereignty, and is something that is not peddled around with tax titles. The State of Mississippi is not a party to this suit; and if she were a party merely as a representative of private litigants the case would have to be decided as one solely between the parties claiming adversely as private suitors.

U. S. v. Beebe, 127 U. S., 398.

"It is well settled that when the government proceeds to set aside its patent, not for the sake of establishing its own right to the property, but in the interest of some person who has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defenses, of laches, limitation and want of equity that would attach to a like suit by an individual."

Moran v. Horsky, 178 U. S., 213.

All the other States and the United States have an interest in the boundaries between the States; an interest that is sovereign and paramount; consequently a

settlement of the boundary between the States cannot be adjudicated solely between private parties.

Florida v. Georgia, 17 How., 494.

Otherwise the danger of collusion would be extreme. The parties to the suit might "by admissions of facts, and by agreements admitting or rejecting testimony, place a case before the court which would necessarily be decided according to their wishes, and the interest and rights of the rest of the Union excluded from the consideration of the court."

Id., p. 495.

Virginia v. West Virginia, 11 Wall., 54.

In the case of Phillips v. Payne, 92 U. S., 134, a private person brought the suit to test the validity of the retrocession of Alexandria to the State of Virginia. The court said :

"The plaintiff in error is estopped from raising the point which he seeks to have decided . He cannot, under the circumstances, vicariously raise a question, nor force upon the parties to the compact an issue which neither of them desires to make."

"Where the government is suing for the use and benefit of an individual, or for the prosecution of a private and proprietary instead of a public or governmental right, it is clear that it is not entitled to the exemption of *nullum tempus*, and that the ordinary rule of laches applies in full force."

French Republic v. Saratoga Vichy Co.,
191 U. S., 438.

This case is very similar. The State of Mississippi has no interest in the suit.

The jurisdiction to settle boundaries between the States and between States and Territories can only be invoked by a State or by the United States.

U. S. v. Texas, 143 U. S., 641.

In Coffee v. Groover, 123 U. S., 30, the court said:

"Settlements of boundary belong to the sovereign power, and cannot be questioned by individuals."

It is clear enough that if the channel had not changed in 1882 this suit would never have been brought.

Respectfully,

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